

1992

Stanley L. Wade v. F. C. Stangl III : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STANLEY L

Plain

vs.

F. C. STANGL III,

Defendant-Appellee.

Case No. 920221-CA

Priority No. 16

BRIEF OF APPELLANT

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STANLEY L. WADE,)	
)	
Plaintiff-Appellant,)	Case No. 920221-CA
)	
vs.)	
)	
F. C. STANGL III,)	Priority No. 16
)	
Defendant-Appellee.)	
)	
)	

On Appeal from the Judgment of
the Third Judicial District Court
for Salt Lake County, State of Utah
Honorable Michael R. Murphy, District Judge

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STANLEY L. WADE,)	
)	
Plaintiff-Appellant,)	
)	Case No. 920221-CA
vs.)	
)	
F. C. STANGL III,)	Priority No. 16
)	
Defendant-Appellee.)	
)	
)	

Appellant Stanley L. Wade ("Wade") appeals a decision of the Third Judicial District Court of Salt Lake County, State of Utah. The district court found in favor of the appellee and appellant contests its ruling. The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah R. App. P., Rules 3 and 4.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW
AND THE STANDARDS OF REVIEW

Issues

1. Was the district court judge in this case biased against Wade to an extent which prevented Wade from receiving a fair trial?

2. Was it prejudicial error for the district court to allow F. C. Stangl III ("Stangl") to raise the issue of an alleged "oral agreement" for the first time at trial without allowing Wade to rebut that argument on the basis of the Statute of Frauds and the Statute of Limitations?

3. Did the Statute of Frauds and the Statute of Limitations require the district court to find that the alleged oral agreement could not form the basis for an assumption by Wade of an obligation to pay more than his share of property taxes?

4. Was the district court's determination that the parties agreed to allocate taxes based upon the proportionate sizes of their parcels clearly erroneous as a matter of law?

5. Absent mutual consent by the parties to allocate taxes based upon acreage, was the district court required to apply the doctrine of equitable conversion, as instructed by the Utah Supreme Court, to determine the appropriate allocation of taxes based upon value?

Standard of Review

The issues above present legal conclusions and questions of law. Therefore, this Court is not required to accord any deference to the district court's findings relative to these issues, but must review them for correctness only. Town of Alta v. Ben Hame Corp., 836 P.2d 797 (Utah App. 1992).

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

Utah Code Ann. § 78-12-25. **Within four years.**

Within four years:

(1) An action upon a contract, obligation,
or liability not founded upon an instrument
in writing

Utah Code Ann. § 25-5-4. **Certain agreements void unless written
and subscribed.**

In the following cases every agreement shall be void
unless such agreement, or some note or memorandum
thereof, is in writing subscribed by the party to be
charged therewith:

(1) Every agreement that by its terms is not
to be performed within one year from the
making thereof.

(2) Every promise to answer for the debt,
default or miscarriage of another.

. . . .

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is a case involving the review of the district court's decision in Wade v. Stangl, C-87-357.

This case began as an action seeking to compel the conveyance of title to a parcel of land. An issue arose regarding a party's alleged failure to pay property taxes.

On an appeal from a summary judgment, the Utah Supreme Court found no contractual default as a result of the alleged failure to pay property taxes. The Utah Supreme Court remanded the case to the district court for a determination of the taxes properly attributable to the parties under the doctrine of equitable conversion.

The district court did not proceed under that doctrine and instead, found, erroneously, that the intent of the written contract was to allocate the taxes based upon acreage.

This appeal is brought contesting the district court's judgment. Specifically, appellant requests this Court to remand the case to the district court with specific instructions to allocate property taxes between the parties under the doctrine of equitable conversion based upon the value of the property. Further, appellant requests this Court to order Appellee to transfer title to him pursuant to their contract.

II. COURSE OF THE PROCEEDINGS AND DISPOSITION BELOW

On January 20, 1987, plaintiff-appellant Wade filed a contract action attempting to obtain the warranty deed to property which he had purchased from defendant-appellee Stangl. The contract price for this property had been paid in full by January 1985. (See Affidavit of Stanley L. Wade, attached hereto as Exhibit A). Stangl filed an Amended Answer and Counterclaim contending that Wade had breached the contract by failing to pay property taxes and therefore was not entitled to conveyance of title.

On October 27, 1989, on appeal from summary judgment entered by the district court in Stangl's favor, the Utah Supreme found that Wade had no contractual obligation to pay the property taxes in dispute. The Utah Supreme Court vacated the summary judgment and remanded the case to the district court with instructions to determine the amount of taxes attributable to Wade's property under the doctrine of equitable conversion.¹

On remand, the district court did not determine the amount of taxes attributable to Wade's property under the doctrine of equitable conversion as instructed by the Utah Supreme Court.

¹ Specifically, the Court stated that "[t]he contract does not impose on the buyer any obligation to pay real property taxes except in the year 1978, and buyer is not therefore in default under the contract for non-payment of taxes. Appellant agrees that he is obligated to pay taxes actually accruing to his land, by reason of the doctrine of equitable conversion. However, the amount of taxes assessed since the year 1978 attributable to the parcel purchased and possessed by appellant is still in dispute." Remittitur No. 890256, Oct. 27 1989, attached hereto as Exhibit B.

The district court found, instead, that the parties had agreed to allocate taxes based upon acreage rather than value.

Specifically, the court found "that it was the parties' intent at the time of execution of the written agreement and thereafter that the taxes should be apportioned based on the respective amount of land owned by each party." Findings of Fact and Conclusions of Law, p. 4, attached hereto as Exhibit C.

The court based this finding upon two alternative theories. First, that letters and documents sent by Stangl to Wade showing Stangl's calculations of taxes based upon acreage (versus value) of land indicated such an intent. Findings of Fact and Conclusions of Law, p. 4 (See Exhibit C). Second, that the parties had reached an oral agreement to base the taxes on acreage rather than value, and said oral agreement was either a separate and subsequent contract concerning property tax allocation, or an oral clarification or modification of the 1978 written contract. Findings of Fact and Conclusions of Law, p. 4 (See Exhibit C).

Based upon the above factors, the district court awarded judgment in Stangl's favor in the amount of \$100,699.90. This consisted of \$54,835 in taxes, \$19,817 in interest, and \$26,047.90 in attorney's fees. Judgment, p. 2, attached hereto as Exhibit D. Including post-judgment interest, Wade has paid

\$106,386.97 to Stangl. See Partial Satisfaction of Judgment, attached hereto as Exhibit E. However, he still has not received title to his property.

III. STATEMENT OF FACTS

1. On May 16, 1978, Wade and Stangl entered into a written installment land contract whereby Wade agreed to purchase 6.87 acres of property from Stangl for \$206,100. See Agreement, attached hereto as Exhibit F.

2. The property sold was located at approximately 9200 South, 700 East, Sandy City, Utah. The 6.87 acres purchased by Wade ("Wade's property") were part of a larger, 9.63 acre tract of land owned by Stangl. Stangl retained ownership of the remaining 2.76 acres. Findings of Fact and Conclusions of Law, p. 2 (See Exhibit C).

3. Wade's property is situated behind Stangl's retained property with respect to 700 East Street, and is accessed by a 50-foot wide strip of land which also serves as a non-exclusive right-of-way for access to Stangl's property. Findings of Fact and Conclusions of Law, p. 3 (See Exhibit C).

4. Pursuant to the 1978 contract, Wade paid Stangl the agreed-upon purchase price of \$206,100. Findings of Fact and Conclusions of Law, p. 3 (See Exhibit C). Final payment occurred in approximately January, 1985 (See Exhibit A).

5. Paragraph 6 of the 1978 written contract provides that "[r]eal property taxes for the year 1978 shall be prorated at the closing." Thus, the parties prorated the 1978 taxes based on (1) the number of days of the year each party owned the property, and (2) the area (square footage) owned by each party as compared to the total area of the 9.63-acre consolidated tract. Findings of Fact and Conclusions of Law, p. 3 (See Exhibit C).

6. The parties intended and assumed that they would be separately taxed on their respective parcels following the year of the closing (1978). The county taxing authorities, however, continued to assess the entire 9.68-acre consolidated tract and did not individually tax the parties' separate parcels until 1991. Findings of Fact and Conclusions of Law, p. 3 (See Exhibit C); Stipulation of Parties, p. 2, attached hereto as Exhibit G.

7. Following 1979, Stangl continued to be taxed for the consolidated property. Stangl, in turn, charged Wade 71.34% of the taxes based on square footage or acreage owned by Wade as compared to the total amount of land within the consolidated tract.² See letters and correspondence from Stangl to Wade, attached hereto as Exhibit H; Memo in opposition to Plaintiff's Motion for Summary Judgment, p. 8, attached hereto as Exhibit I.

² A calculation of property tax allocation based upon value would have resulted in Wade being responsible for approximately 56.66% of the taxes. Plaintiff's Memorandum in Support of Motion for Summary Judgment, p. 7; Affidavit of A. Paul Schwenke; valuation form, all attached hereto as Exhibit K.

8. Wade paid the taxes for the years 1979-1981 based upon Stangl's calculations (See Exhibit G, para. 12). Wade contends that these payments were made each year under the understanding that Stangl intended to have the property split for tax purposes prior to the next tax year. See Transcript, p. 68, attached hereto as Exhibit J.

9. Wade contends that in 1982 he discovered he had paid and was paying substantially more taxes than had actually accrued to his property. Affidavit of Stanley L. Wade, (See Exhibit A). Therefore, between the years of 1982 and 1991, Wade did not make payments based upon Stangl's calculations of apportionment based on acreage. Findings of Fact and Conclusions of Law, p. 3 (See Exhibit C).

10. Pursuant to the judgment of the court below,³ Wade has paid \$106,386.97, including post judgment interest, to Stangl (See Exhibit E). The calculation of taxes by the district court was based upon acreage, not value. Findings of Fact and Conclusions of Law, p. 11, (See Exhibit C).

³ Judgment by the district court for \$54,835 in taxes, \$19,817 in interest, and 26,047.90 in attorney's fees, amounting to \$100,699.90. Judgment, p. 2 (See Exhibit D). The difference between this figure and the \$106,386.97 figure is post-judgment interest.

SUMMARY OF THE ARGUMENT

Appellant Wade requests this Court to order appellee Stangl to convey title of Wade's property to him pursuant to their written contract. Wade also seeks an order from this Court remanding this case to the district court with instructions to determine the proper amount of taxes attributable to his property under the doctrine of equitable conversion. Further, Wade requests this Court to instruct the district court to determine said taxes based upon the value of the respective parties' property.

As justification for these requests, Wade intends to show that the district court's determination of this matter was clearly erroneous as a matter of law. Wade contends that the judge in this case was biased against Wade and that this bias prevented him from receiving a fair trial. In fact, the results of this case can be explained in no other way, as the law clearly supports Wade's positions.

The district court found that the parties entered into an oral contract, or orally modified the existing contract to provide for allocation of taxes based upon acreage. Wade contends that this finding was improper. The issue of such an oral contract had never been raised prior to trial. The district court not only allowed Stangl to raise it at that point, but

refused to allow Wade to rebut the issue because he had not affirmatively pled the defenses prior to trial. How Wade could have affirmatively defended issues which had not yet been raised, and of which he was unaware, is unclear.

The affirmative defenses which Wade attempted to raise at trial barred the admission of the new issue. First, the newly alleged oral contract or orally modified contract was subject to the statute of frauds. In fact, the Statute of Frauds clearly voided such an alleged contract. Second, any action brought by Stangl upon the alleged oral agreement was barred by the statute of limitations.

The district court found, as an alternative to the oral contract theory, that under the written contract the parties intended to base tax allocation upon acreage rather than value. This finding is contrary to the Utah Supreme Court's statements in its Remittitur and clearly inconsistent with applicable laws.

The Utah Supreme Court stated that under the contract there was no obligation on Wade's part to pay taxes. Additionally, they recognized the applicability of the doctrine of equitable conversion as the proper basis upon which to allocate taxes. Under that doctrine, taxes actually attributable to a party's property are to be assessed to that party. These taxes must not be based upon the acreage of the parcels, as the district court

based them, but upon the relative value of the parties' property.

ARGUMENT

I. THE JUDGE IN THIS CASE WAS CLEARLY BIASED AGAINST WADE AND THIS BIAS PREVENTED WADE FROM RECEIVING A FAIR TRIAL

"A litigant is entitled to a trial before a judge who is not biased or prejudiced. . ." 48A C.J.S. §108, p. 728.⁴ This right is based upon the "due process clause of the federal Constitution,⁵ and on the constitutional right to a fair trial. . . ." ⁶ Id.

Where a party charges that bias or prejudice unjustly affected the results of a trial, the court on review is required to "carefully scrutinize the record to see that no injustice has been done the complaining party."⁷ 48A C.J.S. § 108, p. 730.

In the case at hand, there was pervasive evidence of judicial bias. As a result, Wade was unable to obtain a fair trial in this matter.

⁴ Frausto v. Legal Aid Soc., 563 F.2d 1324 (CA9 1977); United States v. Thompson, 483 F.2d 527 (CA3 1973).

⁵ United States v. Sciuto, 531 F.2d 842 (CA7 1976); United States v. Conforte, 457 F. Supp. 641 (D.C. Nev. 1978), aff'd 624 F.2d 869 (CA9 Nev. 1980), cert. den. 101 S.Ct. 568 (1980); Milligan v. Stone, 424 F.Supp. 1088 (S.D. Cal. 1976), aff'd 548 F.2d 878 (CA9 Cal. 1977), cert. den. 432 U.S. 908, 53 L.Ed.2d 1081, 97 S.Ct. 2955 (1977).

⁶ Conforte, 457 F.Supp. 641 (D.C. Nev. 1978).

⁷ People Ex rel. Little v. Saint Louis Merchants' Bridge Co., 118 N.E. 733 (Ill. 1918); Aldridge v. State, 342 S.W.2d 104 (Tex. 1960).

The judge in this case recused himself from hearing certain portions of the case as a result of difficulties he had with Wade's prior counsel. Apparently, Paul Schwenke, one of Wade's attorneys felt that the judge's rulings were so inconsistent with the law and out of line with instructions from the Utah Supreme Court that he believed Judge Murphy was personally prejudiced against him. He wrote a letter to Judge Murphy to that effect. The judge was affronted by the suggestion of bias and referred the matter to the bar.

The Judge also commented at trial that he had had difficulties with another successor counsel of Wade's. As a result, the Judge recused himself from deciding particular issues which he felt might be "intrinsically intertwined with prior counsel for [Wade]." Transcript, p. 2 (See Exhibit J).

Wade consented to the Judge's continued handling of the case under the assumption that the difficulties towards his attorneys did not extend to a bias against him personally. Apparently, however, this was not the case. At crucial points in the trial, the Judge made decisions which were not based upon the law, and which Wade can only assume were based upon a bias or prejudice against him.

As will be discussed below, in one instance, the Judge allowed evidence of an oral contract or modification of the prior

contract to be admitted for the first time at trial. However, he refused to allow Wade's counsel to rebut the new issue with arguments based upon the statute of frauds and the statute of limitations, thus denying Wade the crucial opportunity to meet the new issue properly. This decision was not based upon the law. The law clearly provides that new issues can only be introduced when the opposing party is given a full opportunity to meet the issue. It is difficult to see any explanation for the exclusion of the rebuttal argument other than that the judge was predisposed against Wade based upon the prior difficulties he had with Wade's attorney's.

Further, at one point in the case, evidence was submitted pertaining to a proceeding which Wade went through for fraud. The Judge apparently leaned heavily on this fact in his determination to discredit Wade's testimony. In his concluding statement, the Judge commented that he chose to discredit Wade's testimony based in large part upon the fact that Wade had gone through a fraud proceeding. Transcript, p. 125 (See Exhibit J). It appears that as a result of this introduction, the judge failed to decide the case based upon law, but rather, based it upon his bias towards Wade. The Judge's reaction to the evidence regarding Wade's fraud proceeding was clearly and unduly prejudicial.

II. THE DISTRICT COURT BASED ITS DECISION ON IMPROPER ISSUES AND UNALLOWABLE EVIDENCE

The district court on remand erroneously determined that the allocation of property taxes was to be based upon the proportionate size of the parties' parcels of land rather than upon the value of the parcels. This conclusion was based upon two alternative grounds. First, that there was an oral agreement which either amended the earlier written contract or created a subsequent contract to allocate taxes based upon acreage. Second, that letters and billing statements sent by Stangl to Wade reflecting Stangl's use of acreage to determine apportionment of taxes reflected the intent of the parties' written agreement that tax apportionment would be based on the area owned by each party. Findings of Fact and Conclusions of Law, p. 4 (See Exhibit C).

A. It was Prejudicial Error for the District Court to Allow Stangl to Raise the Issue of An "Oral Agreement" for the First Time at Trial Without Allowing Wade to Rebut the Argument on the Grounds of the Statute of Frauds and Statute of Limitations

The first ground upon which the district court relied in finding that tax allocation should be based upon proportionate share of property was improper. The court found that an oral agreement had been reached by the parties which created an

"amendment to the contract" or a "subsequent contract" regarding the allocation of taxes.

The argument that an oral contract or an amendment to the contract had been made regarding tax allocation had never been raised prior to the trial. Stangl had not advanced this claim in any pleading or prior court appearance. All of the discussions below had rested upon interpreting the written contract. Thus, Wade was not on notice of this claim and was prejudiced by the court's allowance of the issue.

The introduction of a new claim is allowed if two conditions are met.⁸ The first requirement is that the parties implicitly or explicitly consent to its introduction.⁹ Consent can be implied by a party's failure to object to the introduction of evidence relevant to the issue. However,

[a] party cannot be said to have implicitly consented to the trial of an issue not presented by the pleadings unless the party should have recognized that the issue had entered the case at trial. . . . The introduction of evidence arguably relevant to pleaded issues cannot serve to give a party fair notice that new issues are entering the case.

⁸ Rule 15(b) of the Utah Rules of Civil Procedure and Rule 15(b) of the Federal Rules of Civil Procedure form the basis for the introduction of new issues and state in part that "[w]hen issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Utah R.Civ.P. 15(b). The relevant portion of Fed. R.Civ.P. 15 (B) is identical.

⁹ Colman v. Colman, 743 P.2d 782, 785 (Utah App. 1987); General Ins. Co. v. Carnicero Dynasty Corp., 545 P.2d 502, 506 (Utah 1976).

Wesco Mfg., Inc. v. Tropical Attractions of Palm Beach Inc., 833 F.2d 1484, 1487 (CA11 Fla. 1987).¹⁰ Thus, if evidence relevant to the new issue is also relevant to one of the issues already in the case, consent cannot be implied.

In this case, evidence of an alleged conversation between Stangl and Wade concerning tax apportionment was directly relevant to the previously raised issue of the intent of the parties under the contract. Thus, Wade had no reason to know that the new issue of an oral agreement forming the basis for a "new contractual agreement" or "amended contractual agreement" was being introduced. He reasonably believed that the evidence was being introduced for the sole purpose of showing intent. Thus, the first requirement for allowing a new issue was not met, there was no implicit or explicit consent.

The second requirement for the introduction of a new issue at trial is that the non-introducing party be given a fair opportunity to present evidence material to the newly introduced issue. Specifically, the Colman court stated that the test is "whether the opposing party had a fair opportunity to defend and whether it could offer additional evidence if the case were retried on a different theory." Colman, 743 P.2d at 785, citing R. A. Pohl Constr. Co. v. Marshall, 640 F.2d 266, 267 (CA10

¹⁰ See also Colman v. Colman, 743 P.2d 782, 785 (Utah App. 1987).

1981).¹¹ The addition of such an issue "should not be permitted where it would operate to deny a party a fair opportunity to present evidence material to newly-added issues." Mineral Indus. & Heavy Constr. Group v. Occupational Safety & Health Review Com., 639 F.2d 1289 (5th Cir. 1981).¹²

In this case, Wade attempted to raise the issues of the application of the Statute of Frauds and the Statute of Limitations as they applied to the new issue of an oral agreement. As shown in the following section, if these arguments had been permitted, they would have barred the admission of this new issue. However, the court found that the statute of frauds and statute of limitations arguments were waived because they had not been plead prior to trial. Transcript, p. 19, line 22-25 (See Exhibit J). Therefore, the court did not allow Wade to rebut the new argument raised by Stangl pertaining to an oral contract or oral amendment to the prior contract. In violation of the requirements set forth above, Wade was not allowed the opportunity to present evidence crucial to defending against the new claims.

¹¹ See also Ellis v. Arkansas Louisiana Gas Co., 609 F.2d 436, 439 (CA10 Okla. 1979), cert. den. 445 U.S. 964, 64 L.Ed.2d 239, 100 S.Ct. 1653 (1980); De Haas v. Empire Petro. Co., 435 F.2d 1223, 1229 (CA10 Colo. 1970); Simms v. Andrews, 118 F.2d 803, 807 (CA10 Okla. 1941).

¹² See also International Harvester Credit Corp. v. East Coast Truck, 547 F.2d 888, 890 (CA5 1977).

1. The Alleged Oral Contract Between Stangl and Wade Violated the Statute of Frauds.

If a new contract was created, or the existing contract was modified by the alleged oral agreement, this change was void under the Statute of Frauds. According to the Statute of Frauds, an agreement that extends further than one year or one to undertake the debts of another individual is void unless it is in writing and signed by the party who undertakes the responsibility.¹³

In this case, Wade allegedly undertook to pay taxes based on the proportionate share of land he owned. Under this scenario Wade would be agreeing to pay for 71.34% of the taxes. Absent such an agreement (and absent Stangl's refusal to segregate the two parcels for tax purposes) the taxing authorities would have applied an assessment based upon value which would have made Wade liable for only 56.66% of the total taxes for the parcel. (See Exhibit K).

In sum, Wade allegedly undertook to pay a substantial percentage more of the taxes than he was obligated to pay. Thus, he assumed a debt which otherwise would have belonged to Stangl.

¹³ Utah Code Ann. Sec. 25-5-4 **Certain agreements void unless written and subscribed.** In the following cases every agreement shall be void unless such agreement or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith: (1) Every agreement that by its terms is not to be performed within one year from the making thereof. (2) Every promise to answer for the debt, default or miscarriage of another.

.....

Such an assumption of liability fits directly within the Statute of Frauds.

In addition, this alleged assumption of liability purportedly resolved the tax conflict prospectively as the parties allegedly decided not to have the property segregated for future tax purposes. Thus, the alleged agreement would have covered more than a one year period of time, again placing it directly within the requirements of the Statute of Frauds.

Further, if this alleged oral agreement was not a new contract, but rather a modification of the old written contract, it was again void under the Statute of Frauds. If an original contract must satisfy the Statute of Frauds, then any subsequent agreements altering or modifying it must also be in writing and subscribed by the party to be bound. Combined Metals, Inc. v. Bastian, 267 P. 1020 (Utah 1928); Bamberger Co. v. Certified Prods., Inc., 48 P.2d 489 (Utah 1936), adhered to 53 P.2d 1153 (Utah 1935).

An installment contract for the sale of land is unquestionably within the requirements of the statute of frauds, thus, a modification of that contract is also within the statute. For this alleged agreement to be enforceable, it must have been in writing and signed by Wade. No such evidence has been produced because there was no such agreement.

Because this alleged agreement was not in writing it violated the Statute of Frauds and was void. The parties were required to fall back upon the contract, which did not supply any guidance regarding taxes. Thus, as found by the Utah Supreme Court, the laws of equitable conversion applied, requiring the parties to pay those taxes which were directly attributable to their properties according to the value thereof.

2. The Action Brought by Stangl Upon The Alleged Oral Agreement Was Barred by the Statute of Limitations.

Under Utah law, "[a]n action upon a contract, obligation, or liability not founded upon an instrument in writing. . . ." must be brought within four years. Utah Code Ann. § 78-12-15.

Stangl alleges that Wade and he reached an oral agreement in 1980 to apportion taxes based upon their proportionate share of land. The statute above applied directly to such an agreement. The alleged agreement would create an obligation on Wade's part to pay a portion of property taxes in excess of the amount he would be obligated to pay under applicable laws.¹⁴

Any action upon this alleged contract, obligation or liability, could not be brought subsequent to the four years provided for by the statute of limitations. Thus, Stangl's claim that Wade had an obligation to pay taxes in excess of those

¹⁴ According to calculations made by Wade's attorney Paul Schwenke, based upon value Wade was liable for only 56.66% of the taxes. (See Exhibit K).

required by law, was untimely and barred by the statute of limitations.

In sum, because the requirements for the admission of a new issue into a trial were not met in this case, and in fact, the statute of frauds and statute of limitations precluded the issue's admission, it was prejudicial for the court to rely upon those arguments in reaching a decision. Thus, the first ground upon which the court rested its determination that tax allocation should be based upon proportionate areas of land was improper.

B. The District Court's Determination that the Parties Agreed to Allocate Taxes Based Upon the Proportionate Sizes of Their Parcels Was Clearly Erroneous As a Matter of Law.

The trial court found that "it was the parties' intent at the time of execution of the written agreement and thereafter that the taxes should be apportioned based on the respective amount of land owned by each party." Findings of Fact and Conclusions of Law, p. 4, #8 (See Exhibit C). This finding was the second ground for the district court's determination to apportion taxes on the basis of acreage and was clearly erroneous.

The evidence upon which the district court relied in reaching the above conclusion consisted of letters and documents sent by Stangl to Wade. Findings of Fact and Conclusions of Law,

p 4-5, #8-9, (See Exhibit C). According to 17A Am.Jur.2d § 523, although intent under a contract or the existence of a modification of a contract is normally a question for the trier of fact, the interpretation of documentary evidence passing between the parties is a question of law for the appellate court to review.¹⁵ Thus, this Court is not required to defer to the district court's findings based upon the letters and documents which passed between Stangl and Wade.

The district court's finding that "it was the parties' intent at the time of execution of the written agreement and thereafter that the taxes should be apportioned based on the respective amount of land owned by each party,"¹⁶ is not supported by the evidence. The court itself stated in a prior finding that "[t]he parties intended and assumed that they would be separately taxed on their respective parcels following the year of the closing (1978)." Findings of Fact and Conclusions of Law, p. 3, #6 (See Exhibit C). In fact, Stangl testified that the expectation of the parties pertaining to the taxes was "that the taxing authorities would bill each of us for our respective taxes, and we would each pay our respective taxes for our parcel." Transcript, p. 11, Lines 18-20 (See Exhibit J). Thus,

¹⁵ Hardy v. Ward, 150 N.C. 385, 64 S.E. 171 (1909).

¹⁶ Findings of Fact and Conclusions of Law, p. 4, #8 (See Exhibit C).

the parties assumed that they would be taxed by the authorities, who, as a matter of law, tax individuals based upon the **value** of their property.

To argue that the intent at the time the contract was written was that property taxes would be apportioned based upon the proportionate sizes of the property is ludicrous given the admission that the original intent was to be taxed separately based on value.

The only grounds upon which an intent different than that established above could be shown, is if the contract, and thus the intent, were modified. However, as discussed above, because the contract was in writing, any modification would have to be in writing also. Further, in order for a contract to be modified, "the minds of the parties must have met upon an asserted contract modification." Provo City Corp. v. Nielson Scott Co., 603 P.2d 803, 806 (Utah 1979); Marnon v. Vaughan Motor Co., 194 P.2d 992 (Or. 1948).

In this case, the documents which the court relied upon in determining that the parties had intended the taxes to be allocated based upon acreage were prepared by Stangl. There was no indication in the documents that Wade agreed to this basis for taxation. "[A] party cannot by self-serving declarations make evidence for himself concerning his dealings with the other party

or the liability of such other party." National Importing & Trading Co. v. E. A. Bear & Co., 155 N.E. 343 (Ill. 1925); George J. Cooke Co. v. Fred Miller Brewing Co., 146 N.E. 459 (Ill. 1925).

Merely because Stangl wished to have the taxes allocated between himself and Wade based on acreage, and in fact prepared documents based upon these calculations rather than based on value, is not evidence that Wade agreed to such an allocation. According to 17A Am.Jur.2d, "[t]he mental purpose of one of the parties to a contract cannot change its terms . . ."¹⁷ One receiving an offer to change a contract to which he is a party is held to be under no obligation to answer it; and his silence cannot be construed as an acceptance . . ."¹⁸ 17A Am.Jur.2d §520, p. 537. Thus, the documents relied upon by the district court could not have established a mental intent to change the contract or enter a new contract.

III. AS INSTRUCTED BY THE UTAH SUPREME COURT, THE ONLY APPROPRIATE ALLOCATION OF TAXES IN THIS CASE WAS UNDER THE DOCTRINE OF EQUITABLE CONVERSION

The Utah Supreme Court issued a Remittitur vacating a summary judgment ruling of the district court and remanding the

¹⁷ New York C. R. Co. v. Mohney, 252 U.S. 152, 64 L. Ed. 502, 40 S. Ct. 287 (1920); Southern Acid & Sulphur Co. v. Childs, 184 S.W.2d 586 (Ark. 1945).

¹⁸ Suitter v. Thompson, 358 P.2d 267 (Or. 1960).

case (See Exhibit B). In its Remittitur, the Utah Supreme Court stated in part:

The contract does not impose on the buyer any obligation to pay real property taxes except in the year 1978, and buyer is not therefore in default under the contract for non-payment of taxes. Appellant agrees that he is obligated to pay taxes actually accruing to his land, by reason of the doctrine of equitable conversion. However, the amount of taxes assessed since the year 1978 attributable to the parcel purchased and possessed by appellant is still in dispute.

(See Exhibit B).

The Utah Supreme Court determined that the contract in question did not provide for an ongoing obligation for real estate taxes. Rather, the Utah Supreme Court acknowledged Wade's responsibility to pay taxes under the doctrine of equitable conversion.

Pursuant to the doctrine of equitable conversion, the buyer, Wade, is liable for taxes directly attributable to the property he purchased. The Utah Supreme Court held that the amount of taxes actually attributable to Wade's property was a factual question still in dispute and remanded the case to the district court to determine that issue. Unfortunately, the district court did not decide this issue.

Under the doctrine of equitable conversion

the party who is in possession or entitled to possession at the time of accrual, is ordinarily bound to pay taxes accruing on the land after the making of

the contract and before a conveyance, unless there has been a delay in making the conveyance caused by the fault of the other party (seller).

77 Am.Jur.2d Vendor and Purchaser § 326 (1975).¹⁹

Thus, the buyer is responsible for paying the taxes which accrue on the land unless the seller causes a delay in making the conveyance.

In this case, Wade concedes liability to pay taxes for the years 1982 through 1984 and only questions what taxes are directly attributable to his property. However, pertaining to the years 1985 through 1990, Wade rests upon the second part of the doctrine of equitable conversion. As mentioned, when a seller causes a delay in making the conveyance, the buyer is not liable to pay taxes. This is not read as a strict transfer of tax liability to the seller, but rather is generally held to mean that the buyer is not liable to pay, until the seller performs by conveying the property. Annotations, Effect of Delay in Making Conveyance, 12 A.L.R. 416, 417 (1975) and cases cited therein. Stangl admits that Wade made all of his payments as required by the contract (See Exhibit G). Thus, when Wade made his final

¹⁹ See also 12 A.L.R. 412, 414 (1921) citing Free v. Little, 88 P. 407 (Utah 1907).

payment on the contract in January of 1985, Stangl was concurrently obligated to convey the property to Wade.²⁰

Because Stangl did not convey the property to Wade, and still has not done so, Wade is not obligated to pay the taxes. Stangl caused "a delay in the conveyance" which excused Wade's payment of taxes subsequent to 1985. Stangl's delay also resulted in the continuation of this controversy. If Stangl had performed and recorded a conveyance in January, 1985, Wade would have been assessed for his land separately and this controversy would have been limited to the taxes assessable to Wade's land in 1979-1984.

A. The Only Appropriate Method of Allocating Taxes Under the Doctrine of Equitable Conversion is Based Upon the Relative Value of Each Parties' Property

Taxation of property by the state must be based upon the value of the property. Any other means of allocating taxes imposes an unfair and unequal burden upon the individual.²¹ Absent evidence that parties to a contract mutually agreed to base allocation of taxes upon some other basis, a court must

²⁰ See Johnson v. Jones, providing that "[w]here there is an agreement on the part of one to convey and on the part of another to pay a definite sum, payment and conveyance are concurrent acts. . ." Johnson, 164 P.2d 893 (Utah 1946). See also 77 Am.Jur.2d Vendors and Purchasers, § 63 (1975).

²¹ In fact, certain states, such as Maine and Colorado, have enacted Constitutional provisions requiring allocation of property taxes based upon value as a result of these concerns. Maine Milk Producers, Inc. v. Commissioner of Agric. Food & Rural Resources, 483 A.2d 1213 (Me. 1984); United States Transmission Systems, Inc., v. Board of Assessment Appeals, 715 P.2d 1249 (Colo. 1986).

apply a value method of allocation. An individual has a right to be assessed taxes on the same basis as all other individuals and a court has no authority to violate that right.

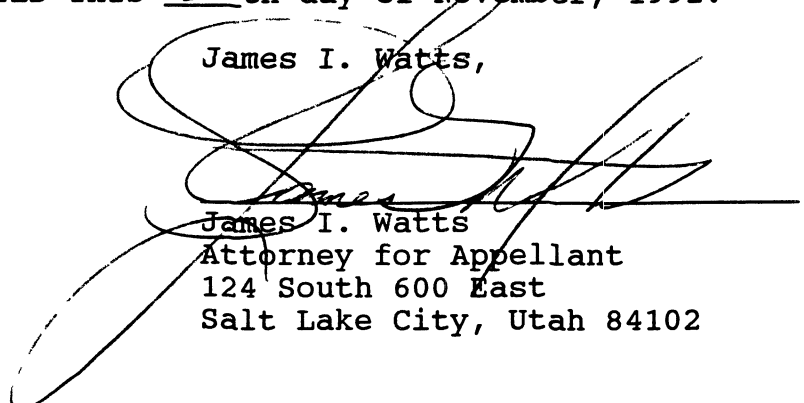
In this case, there is no evidence of a mutual agreement between Stangl and Wade to allocate taxes based upon some other method. Therefore the district court violated Wade's rights in allowing tax allocation on the basis of acreage as opposed to the value of the parties' parcels of land.

CONCLUSION

Based upon the foregoing, Wade respectfully requests this Court to order appellee Stangl to convey title of Wade's property to him pursuant to their written contract. Wade also requests an order from this Court remanding this case to the district court with instructions to determine the proper amount of taxes attributable to his property under the doctrine of equitable conversion. Further, Wade requests this Court to instruct the district court to determine said taxes based upon the value of the respective parties' property.

RESPECTFULLY SUBMITTED THIS 20th day of November, 1992.

James I. Watts,


James I. Watts
Attorney for Appellant
124 South 600 East
Salt Lake City, Utah 84102

CERTIFICATE OF DELIVERY

THIS IS TO CERTIFY that a true and correct copy of the forgoing PLAINTIFF-APPELLANT BRIEF was hand delivered, on this 20th day of November, 1992 to:

Stephen G. Crockett
Giauque, Crockett & Bendinger
Attorneys for Appellee
136 South Main Street, Suite 500
Salt Lake City, Utah 84101

Daniel A. Jensen
Kimball, Parr, Waddoups,
Brown & Gee
Attorneys for Appellee
185 South State Street
Salt Lake City, Utah 84147

By 

Exhibit A

BY _____ Deputy Clerk

STANLEY L. WADE,
Plaintiff,

vs.

F.C. STANGL III
Defendant.

)
) AFFIDAVIT OF STANLEY L.
) WADE IN SUPPORT OF HIS
) MOTION FOR SUMMARY
) JUDGMENT.
)
)
) Case No. C87-357
)
)
) Honorable Michael Murphy

1. On or about May 16, 1978, I entered into a real estate contract with the Defendant, wherein the Defendant sold me a greater portion of a parcel of land that he owned. The Defendant retained a smaller frontage portion of the land with a building on it. I took the larger rear acreage.

3. I protested by refusing to pay any more taxes until the amount of taxes that are actually accrued to my portion of the

4. I completed my performance under the contract in January, 1985, but the Defendant refused to convey me the land.

5. I hired my attorney in or about December, 1986, to enforce my rights under the contract.

6. I have paid \$9,750.86 toward the property taxes between 1978 and 1981.

7. I am paying attorney fees in connection with this case in the sum itemized in my attorney's affidavit in support of this motion for summary judgment.

8. That I have also paid costs as itemized by my attorney in his affidavit in support of this motion for summary judgment.

I respectfully submit this affidavit this ____ day of March, 1990.

151
Stanley L. Wade

Stanley L. Wade appeared personally before me and stated that he has personal knowledge of the facts stated herein.

Subscribed and sworn to before me this 25th day of March, 1990.

151
NOTARY PUBLIC, residing
in Salt Lake County.

My Commission expires:

3/26/20

00651

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed, postage pre-paid, a true and exact copy of the foregoing Affidavit to Steven G. Crocket, attorney for Defendant, at 185 South State Street, Suite 1300, Salt Lake City, Utah 84111 this 21st day of March, 1990.

15/

0000

Exhibit B

IN THE SUPREME COURT OF THE STATE OF UTAH

-----oo00oo-----

Regular May Term, 1989

October 5, 1989

Stanley L. Wade,
Plaintiff and Appellant,

REMITTITUR
No. 890256
District No. C87-357

v.
F.C. Stangl, III,
Defendant and Appellee.

Appellant's motion to reverse the judgment entered by the district court is hereby granted, and the appellee's motion to affirm the judgment is denied.

The trial court was manifestly in error in granting summary judgment where material facts are in dispute. The contract does not impose on the buyer any obligation to pay real property taxes except in the year 1978, and buyer is not therefore in default under the contract for non-payment of taxes. Appellant agrees that he is obligated to pay taxes actually accruing to his land, by reason of the doctrine of equitable conversion. However, the amount of taxes assessed since the year 1978 attributable to the parcel purchased and possessed by appellant is still in dispute.

The judgment is vacated, and this matter is remanded to the trial court for taking evidence and for further proceedings not inconsistent with this order.

FILED DISTRICT COURT
Third Judicial District

Issued: October 25, 1989

Record: None

*Nothing transmitted
" remitted L.P.*

OCT 27 1989 00331

BY *[Signature]*
Deputy Clerk

Exhibit C

OCT 31 1991

Stephen G. Crockett (A0766)
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136 South Main Street, Suite 500
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SALT LAKE COUNTY
Master Bills

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Telephone: (801) 532-7840

Attorneys for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY,
STATE OF UTAH

STANLEY L. WADE,)	
)	
Plaintiff,	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
vs.)	
)	
F. C. STANGL III,	)	Civil No. C-87-357
	)	Judge Michael R. Murphy
Defendant.)	
)	

This matter came on regularly for a bench trial before the Honorable Michael R. Murphy, District Judge, on the 4th day of October, 1991. Plaintiff Stanley L. Wade was present and was represented by his counsel of record, Bruce J. Nelson. Defendant F.C. Stangl III was present and was represented by his counsel of record, Stephen G. Crockett and Daniel A. Jensen. The Court having reviewed the pleadings on file herein, having received sworn testimony, exhibits and other evidence at trial, and being fully advised in the premises, hereby makes and enters the following:

FINDINGS OF FACT

1. Both plaintiff (hereafter "Wade") and defendant (hereafter "Stangl") are residents of Salt Lake County, Utah. The contract or contracts involved in this dispute were entered into by the parties in Salt Lake County, Utah. The real estate which was the subject of this dispute is located within Salt Lake County, Utah.

2. Pursuant to a written installment land contract dated May 16, 1978, Wade agreed to buy, and Stangl agreed to sell, 6.87 acres of real property for the price of \$206,100. The balance of the purchase price was payable to Stangl in 79 equal monthly installments. While the contract references an attached Exhibit A describing the property purchased by Wade, no such exhibit was ever attached to the contract.

3. The property sold (hereafter "Wade's Property") consisted of a parcel of land located at approximately 9200 South, 700 East, Sandy City, Utah. The 6.87 acres comprising Wade's Property were part of a larger tract of land owned by Stangl containing 9.63 acres. Stangl retained ownership of the remaining 2.76 acres. As depicted on the County Recorder's plat attached hereto as Exhibit A, Wade's Property is generally situated behind Stangl's retained property with respect to 700 East Street, and is accessed by a 50-foot wide strip of land which also serves as a non-exclusive right-of-way for access to Stangl's property. Wade's Property, which

includes the underlying fee to the right-of-way tract and totals 6.87 acres, is described more particularly in Exhibit B hereto.

4. Pursuant to the written 1978 contract, Wade eventually paid Stangl the agreed-upon purchase price of \$206,100.

5. Paragraph 6 of the 1978 written contract provides that "[r]eal property taxes for the year 1978 shall be prorated at the closing." The parties did in fact prorate the 1978 taxes based on (1) the number of days of the year each party owned the property, and (2) the area (square footage) owned by each party as compared to the total area of the 9.63-acre consolidated tract.

6. The parties intended and assumed that they would be separately taxed on their respective parcels following the year of the closing (1978). The county taxing authorities, however, continued to assess and tax Stangl for the entire 9.63-acre consolidated tract and did not individually tax the parties' separate parcels because no conveyance of Wade's Property had taken place, nor was any conveyance yet required under the terms of the installment land contract (which had a 6½-year executory period).

6. During the years 1979, 1980 and 1981, the parties continued their practice of apportioning the property taxes based on the square footage or acreage owned by each party as compared to the total amount of land within the consolidated tract. Beginning with the year 1982, Wade failed and refused to pay any amount for taxes on the subject property and has at all times since

failed and refused to pay any amount toward the appurtenant property taxes.

7. In 1980, the parties orally agreed to split the tax liability for the consolidated tract according to the proportionate amount of land owned by each party. This oral agreement prospectively resolved the issue of tax liability allocation between the parties. The primary reason for the parties' oral agreement was that doing so would result in lower taxes for each party than would be the case if the two parcels were segregated and separately assessed and taxed. This 1980 oral agreement was either a separate and subsequent agreement by the parties concerning property tax allocation, or was an oral clarification or modification of the 1978 written contract which was ambiguous in that it addressed only the taxes for 1978 (the first year of a 6½-year executory contract). The oral agreement also reflected the prior conduct of the parties from and after 1978 with respect to property tax apportionment.

8. The letters and other documents contained in Exhibit P of the parties' Stipulation were sent and received by Wade or someone on Wade's behalf. Even if there was no subsequent oral agreement concerning tax apportionment, the documents in Exhibit P of the Stipulation reflect the parties' intent at the time of execution of the written agreement and thereafter that the taxes should be apportioned based on the respective amount of land owned by each party.

9. Therefore, either (1) the 1980 oral agreement was an amendment to the earlier written contract or was a subsequent contract which in either case prospectively resolved the issue of property tax apportionment (which oral agreement was not subject to the Statute of Frauds because it involved no transfer of an interest in land but only effected a resolution of property tax responsibility), or (2) the documents contained in Exhibit P of the parties' Stipulation reflect the intent of the parties' written agreement that tax apportionment would be based on the area owned by each party, and such evidence of intent is important and determinative in resolving the ambiguity concerning future tax apportionment in the written contract. Under either of these alternative findings, the parties conclusively agreed that the property taxes would be allocated according to the amount of land owned by each party. The Court did not rely on evidence submitted by Stangl that the taxes did in fact increase for each party when the parties' parcels were finally segregated and separately assessed in 1991.

10. Until the 1991 tax year, the consolidated 9.63-acre tract of land was never separately assessed to establish individual taxes for Wade's 6.87 acres and Stangl's retained 2.76 acres. Instead, Stangl has been taxed each year for the consolidated property as a single, undivided parcel. In order to avoid loss of the property through a tax sale, Stangl has paid the property taxes assessed against the entire consolidated tract each year since 1978 except

for the years 1990 and 1991, which taxes have not yet been paid. Stangl has agreed and is responsible to pay the full amount of said 1990 taxes on the consolidated property provided that Wade first satisfies in full the judgment entered by this Court, which judgment includes apportionment of the 1990 taxes. Beginning with the 1991 tax year, the two parcels will be separately taxed and the parties will be individually responsible for payment of the taxes assessed against their respective parcels for each year from and after 1991.

11. Stangl has been paid in full by Wade for Wade's proportionate share of the 1978, 1979, 1980 and 1981 taxes. Wade is, however, liable to Stangl for Wade's proportionate share of the taxes for 1982 through 1990, together with prejudgment interest thereon at the legal rate. The amount of said 1982-1990 taxes and interest was stipulated by the parties to be \$74,652, as indicated in Exhibit C hereto. Exhibit C accurately sets forth the apportioned property taxes for the tax years 1982 through 1990 based on the acreage owned by each party and the equal division of acreage beneath the right-of-way. For the 1991 tax year, the two parcels will for the first time be taxed separately. Therefore, no apportioned amount is included in Exhibit C for the year 1991. Exhibit C also accurately sets forth the prejudgment interest on Wade's proportionate share of the taxes in accordance with Utah Code Ann. § 15-1-1(2). As reflected by Exhibit C, the total amount

of taxes and prejudgment interest owed by Wade to Stangl is \$74,652.

12. In August of 1989, Stangl engaged Strategis Asset Valuation and Management Company to appeal the amount of taxes assessed to the consolidated property for 1989. Strategis succeeded in lowering the 1989 taxes from \$27,029.80 to \$11,752.02, a savings of \$15,277.78 to both parties. Strategis' fee for such action was 33.3% of the reduction amount of \$15,277.78, or \$5,087.50. This amount is properly considered a tax-related expense inuring to the benefit of both parties and was therefore properly added to the tax amount for 1989 to be apportioned between the parties along with the tax for that year as shown in Exhibit C.

13. It is appropriate that acreage apportionment of the property taxes extend beyond the time when Wade completed his installment payments and continue until the time the parties' parcels were severed and separately assessed and taxed (i.e., through the 1990 tax year) because of: (1) Wade's failure, despite an appropriate discovery request, to produce or identify relevant documents that he claimed to have drafted; (2) Wade's failure to communicate in a reasonable and timely manner with his attorney or attorneys (or with opposing counsel and/or this Court if Wade had no attorney); and (3) Wade's overall failure to involve himself in the lawsuit he initiated.

14. The Court generally credited Stangl's testimony and discredited Wade's testimony because of, inter alia, Wade's

admitted fraudulent activities that took place contemporaneously with this lawsuit. Wade's insistence that he at all times relied entirely on Stangl in connection with all relevant issues is indicative to the Court of fraudulent conduct and of an attempt by Wade to alter or withhold the truth.

15. The Counterclaim against Wade, filed December 21, 1988, has never been answered. Technically, therefore, Wade is in default. The Counterclaim seeks dismissal of Wade's Complaint with prejudice, reimbursement of Wade's share of the property taxes and interest thereon at the legal rate, and attorneys fees and costs. Stangl is entitled to such relief.

16. Paragraph 15 of the parties' 1978 written agreement provides that, in the event of a default under the agreement, the prevailing party shall recover from the losing party reasonable attorneys fees and costs. There is no requirement in the agreement for notice of said default in order for the right to attorneys fees to attach. Even if notice of default was required to receive attorneys fees, trial Exhibit CC reflects that Wade was given notice of his default. Because Wade failed thereafter to pay his share of the property taxes, said default was never cured. Stangl's 1988 Counterclaim, of which the Court takes judicial notice, is further notice to Wade of his default under the contract. Furthermore, at the beginning of the trial the parties stipulated that their dispute focused on said written agreement and that the prevailing party is entitled to attorneys fees. Stangl

is the prevailing party and is therefore entitled to reasonable attorneys fees and costs, evidence of which is to be submitted to the Court by affidavit in accordance with Rule 4-505 of the Utah Code of Judicial Administration.

17. F.C. Stangl Construction Company check No. 55499, payable to Stanley L. Wade in the amount of \$52,776.00, was hand-delivered to A. Paul Schwenke, the attorney of record and the attorney in actuality for Wade, on behalf of and as agent for Wade. A withdrawal of counsel A. Paul Schwenke, purportedly executed on March 7, 1989, was never filed with the Court and was not served on opposing counsel despite a certificate of service to the contrary. Even if the withdrawal had been filed, Mr. Schwenke continued to represent Wade by, for example, prosecuting a successful Motion for Summary Disposition with the Utah Supreme Court in July 1989 and by filing a Certificate of Readiness for Trial with this Court on May 24, 1990. The Court takes judicial notice of the fact that Mr. Schwenke continued to file numerous pleadings on Wade's behalf, the first one (a notice to submit for decision) dated only six days after the purported withdrawal of counsel. The only withdrawal of counsel by Mr. Schwenke was filed with the Court on January 9, 1991. Wade's sworn affidavit, acknowledged on March 25, 1990 (trial Exhibit Y), expressly references an accompanying affidavit prepared by Wade's attorney, Mr. Schwenke. Mr. Schwenke's affidavit itemizes costs and services rendered on Wade's behalf over a period exceeding one year

following Schwenke's purported withdrawal from the case on March 7, 1989. Wade's affidavit convinces the Court that Wade was aware of Mr. Schwenke's ongoing representation. In light of the above, the unfiled withdrawal of counsel does not constitute a withdrawal from the case by Mr. Schwenke. The agency relationship between Wade and Schwenke therefore continued to abide until January 9, 1991, when Schwenke formally withdraw as counsel.

18. Alternatively, even if Mr. Schwenke did inform Wade that he was withdrawing as counsel, Wade failed to adhere to his obligation to timely communicate the withdrawal to this Court and/or to opposing counsel. Instead, Wade knowingly neglected this action from the date of Schwenke's purported withdrawal in March 1989 until Wade engaged his present counsel in February 1991. Wade's complete failure to attend in any way to a pending proceeding justifies and excuses any and all good faith actions taken by opposing counsel during Wade's neglect of this matter.

19. Accordingly, A. Paul Schwenke was, at the time said check was tendered to him, Wade's agent in law and in fact, by actuality and by appearance. The subsequent alteration of the check is deemed to be the act of Wade, and Wade is not entitled to any offset or credit with respect to said check or with respect to the funds represented by said check. Stangl is deemed to have repaid in full the sum he was obligated to repay to Wade by virtue of this Court's Order of November 21, 1989.

20. Upon full satisfaction of the judgment to be entered by the Court against Wade, Stangl is to convey to Wade the property described in Exhibit B, subject to the non-exclusive right-of-way described above, in accordance with the terms of the parties' written agreement.

21. The Court wishes to note that Bruce J. Nelson, Wade's present counsel, was not associated in any way with Wade's prior counsel and had no involvement whatsoever with the fraudulent and unethical activities alleged by Wade to have taken place earlier in the course of this dispute.

From the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

1. This Court has proper jurisdiction over the parties and the subject matter hereof.

2. Stangl is entitled to a judgment from Wade, which judgment should be entered in accordance with the Findings and Conclusions herein.

3. As explained in the foregoing Findings of Fact, the property taxes attributable to the consolidated tract of land containing the parties' respective parcels should properly be allocated between the parties according to the proportionate amount of area owned by each party, as set forth in Exhibit C.

4. Because of Wade's breach of the parties' written and/or oral agreement or agreements, Wade is liable to Stangl for Wade's

proportionate share of the property taxes for the years 1982 through 1990, together with prejudgment interest thereon at the legal rate, which sums amount to a total of \$74,652.00. Stangl is, therefore, pursuant to his Counterclaim filed on December 21, 1988, entitled to a judgment in his favor of \$74,652.00, plus post-judgment interest at the legal rate, plus whatever amount of attorneys fees and costs the Court deems appropriate upon submission of evidence of same. Additionally, Wade's Complaint should be dismissed with prejudice.

5. As the prevailing party, Stangl is entitled to reasonable attorneys fees and costs, evidence of which is to be submitted to the Court by affidavit in accordance with Rule 4-505 of the Utah Code of Judicial Administration.

6. At the time Stangl's check No. 55499 in the amount of \$52,776.00 was tendered to A. Paul Schwenke, Mr. Schwenke was Wade's agent in law and in fact, by actuality and by appearance. The subsequent alteration of the check is deemed to be the act of Wade, and Wade is not entitled to any offset or credit with respect to said check or with respect to the funds represented by said check. Stangl is deemed to have repaid in full the sum he was obligated to repay to Wade by virtue of this Court's Order of November 21, 1989.

7. Stangl is responsible to pay the full amount of the 1990 taxes on the consolidated property, provided that Wade first

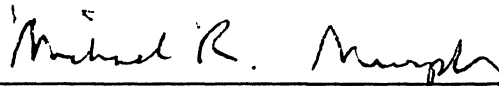
satisfies in full the judgment to be entered by this Court, which judgment will include apportionment of the 1990 taxes.

8. Beginning with the 1991 tax year, the parties' properties will be separately taxed and the parties will be individually responsible for payment of the taxes assessed against their respective parcels for each year from and after 1991.

9. Upon full satisfaction of the judgment to be entered by the Court against Wade, Stangl shall be obligated to convey to Wade the property described in Exhibit B, subject to the non-exclusive right-of-way described in said Exhibit.

MADE AND ENTERED this 31st day of October, 1991.

BY THE COURT:



HONORABLE MICHAEL R. MURPHY
District Judge, State of Utah

CERTIFICATE OF SERVICE

This is to certify that on this ~~31st~~ ² 11th day of October, 1991, a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW was hand-delivered to:

Bruce J. Nelson, Esq.
ALLEN NELSON HARDY & EVANS
215 South State, Suite 900
Salt Lake City, UT 84111
Attorneys for Plaintiff

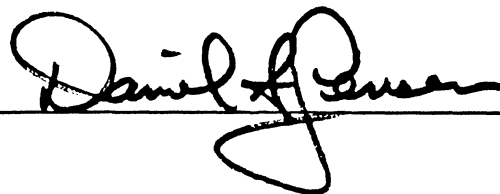


Exhibit D

Stephen G. Crockett (A0766)
GIAUQUE, CROCKETT & BENDINGER
136 South Main Street, Suite 500
Salt Lake City, UT 84101
Telephone: (801) 533-8383

Third Judicial District

NOV 1 1991

SALT LAKE COUNTY

Marlene Bells

Daniel A. Jensen (A5296)
KIMBALL, PARR, WADDOUPS, BROWN & GEE
185 South State Street, Suite 1300
P.O. Box 11019
Salt Lake City, UT 84147
Telephone: (801) 532-7840

Attorneys for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY,

STATE OF UTAH

2169573

11-5-91-821am.

STANLEY L. WADE,

Plaintiff,

vs.

F. C. STANGL III,

Defendant.

JUDGMENT

Civil No. C-87-357

Judge Michael R. Murphy

This matter came on regularly for a bench trial before the Honorable Michael R. Murphy, District Judge, on the 4th day of October, 1991. Plaintiff Stanley L. Wade was present and was represented by his counsel of record, Bruce J. Nelson. Defendant F.C. Stangl III was present and was represented by his counsel of record, Stephen G. Crockett and Daniel A. Jensen. The Court having reviewed the pleadings on file herein, having received sworn testimony, exhibits and other evidence at trial, having heard arguments of counsel, having entered its Findings of Fact and

Conclusions of Law, having received appropriate affidavits in support of attorneys' fees, and being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Plaintiff's Complaint is hereby dismissed with prejudice.

2. Defendant is entitled to judgment against plaintiff in accordance with the Court's Findings of Fact and Conclusions of Law. The amount of said judgment is as follows:

Plaintiff's proportionate share of property taxes for 1982-1990.....	\$54,835
Pre-judgment interest thereon at the legal rate.....	\$19,817
Attorneys' fees and costs.....	<u>\$26,047.90</u> <i>MR</i>
TOTAL	<u>\$100,699.90</u> <i>MR</i>

Defendant is also entitled to post-judgment interest at the legal rate and costs incurred in satisfaction of said judgment.

3. Upon full satisfaction of this judgment by plaintiff, defendant shall (1) pay the full amount of the 1990 taxes on the parties' consolidated property, and (2) convey to plaintiff the property described in Exhibit B to the Court's Findings of Fact and Conclusions of Law, subject to the non-exclusive right-of-way described in said Exhibit.

4. Beginning with the 1991 tax year, the parties shall be individually responsible for payment of the property taxes separately assessed against their respective parcels of land.

DATED this 1st day of November, 1991.

BY THE COURT:

Michael R. Murphy
HONORABLE MICHAEL R. MURPHY
District Judge, State of Utah

CERTIFICATE OF SERVICE

This is to certify that on this 22nd day of October, 1991, a true and correct copy of the foregoing JUDGMENT was hand-delivered to:

Bruce J. Nelson, Esq.
ALLEN NELSON HARDY & EVANS
215 South State, Suite 900
Salt Lake City, UT 84111
Attorneys for Plaintiff

Deanna Christensen

Exhibit E

Stephen G. Crockett (A0766)
GIAUQUE, CROCKETT & BENDINGER
136 South Main Street, Suite 500
Salt Lake City, UT 84101
Telephone: (801) 533-8383

4 25 PM '92
DISTRICT
CITY
CLERK

Daniel A. Jensen (A5296)
KIMBALL, PARR, WADDOUPS, BROWN & GEE
185 South State Street, Suite 1300
P.O. Box 11019
Salt Lake City, Utah 84147
Telephone: (801) 532-7840

Attorneys for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY,
STATE OF UTAH

STANLEY L. WADE,	)	2169577
	)	PARTIAL SATISFACTION OF
Plaintiff,	)	JUDGMENT
)	
vs.)	
)	
F. C. STANGL III,	)	Civil No. C87-357
)	
Defendant.	)	Honorable Michael R. Murphy

F. C. STANGL III, defendant in the above-captioned matter,
hereby gives notice through his counsel of record:

1. That on November 1, 1991, the Court entered judgment in
his favor and against plaintiff Stanley L. Wade in the amount of
\$100,699.90, which judgment was docketed on November 5, 1991.

2. That on June 11, 1992, defendant collected \$86,843.97
from plaintiff in partial satisfaction of said judgment.

3. That on June 11, 1992, plaintiff owed defendant \$7,217.29
in post-judgment interest at the legal rate of 12% pursuant to Utah

Code Ann. § 15-1-4, together with the full principal amount of the \$100,699.90 judgment.

4. That after deducting plaintiff's payment of \$86,843.97 from the total amount owing as of June 11, 1992, plaintiff still owed defendant \$21,073.22 pursuant to said judgment plus post-judgment interest at the legal rate of 12% from and after June 11, 1992.

5. That on July 1, 1992, defendant collected an additional \$19,543.00 from plaintiff in partial satisfaction of said judgment.


6. That on July 1, 1992, plaintiff owed defendant \$138.56 in post-judgment interest at the legal rate of 12% pursuant to Utah Code Ann. § 15-1-4, together with the remaining judgment amount of \$21,073.22.

7. That after deducting plaintiff's payment of \$19,543.00 from the total amount owing as of July 1, 1992, plaintiff still owes defendant \$1,668.78 pursuant to said judgment plus post-judgment interest at the legal rate of 12% from and after July 1, 1992.

8. That plaintiff has partially satisfied the interest-accruing judgment against him to the extent of \$106,386.97, but as of July 1, 1992, still owes defendant \$1,668.78 pursuant to said judgment.

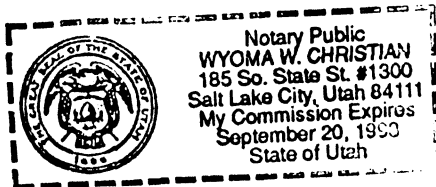
DATED this 6 day of July, 1992.


KIMBALL, PARR, WADDOUPS, BROWN & GEE

By 
Daniel A. Jensen
Attorneys for Defendant

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

The foregoing instrument was acknowledged before me this 6th
day of July, 1992, by DANIEL A. JENSEN.




NOTARY PUBLIC, residing in
Murray, Utah

My commission expires:
9-20-93

CERTIFICATE OF SERVICE

This is to certify that on this 6th day of July, 1992, a true and correct copy of the foregoing PARTIAL SATISFACTION OF JUDGMENT was mailed, postage prepaid, to:

Stanley L. Wade
2159 East Parley's Terrace
Salt Lake City, UT 84109



Exhibit F

A

A G R E E M E N T

THIS AGREEMENT is entered into this 16th day of May, 1978, by and between STANLEY WADE, hereinafter referred to as "Buyer," and F. C. STANGL III, hereinafter referred to as "Seller," with reference to the following facts:

A. Seller is the owner of a certain tract of real property located in Sandy City, Salt Lake County, Utah, which property is more particularly described on Exhibit "A" attached hereto and incorporated herein by this reference as Parcels 1 and 2. Parcel 2 of the land as described above and on Exhibit "A" hereto is sometimes referred to herein as the "Property".

B. Seller desires to sell the Property to Buyer and Buyer desires to purchase the Property from Seller on the terms herein set forth.

NOW, THEREFORE, in consideration of the mutual covenants and promises herein set forth, the parties hereto agree as follows:

1. Purchase Price; Payment. The total purchase price for the Property shall be \$206,100. The purchase price will be paid to Seller in the following manner:

1.1 Buyer has heretofore paid \$1,000 to Seller as earnest money, receipt of which is hereby acknowledged.

1.2 The additional sum of \$49,000 shall be paid by Buyer to Seller at the time of closing, which closing shall be on or before May 16, 1978.

1.3 The balance of \$156,100, together with interest on the unpaid balance from and after closing, at the rate of 8-1/2% per annum, shall be paid as follows:

Seventy-nine (79) equal monthly installments of principal and interest in the amount of \$2,586.91 each, with the first payment being due and payable on July 1, 1978, with interest from the closing date to June 1, 1978, to be paid by Seller at the closing. No prepayment shall be allowed without 00391

Seller's express written consent.

2. Encumbrances. It is understood and agreed that after closing there will exist against the Property and Parcel 1 a Trust Deed securing a Note in favor of Ralph H. Tolman and Betty R. Tolman (hereinafter referred to as the underlying obligation) copies of which are attached hereto as Exhibit "B" and incorporated herein by reference and those easements and restrictions, as listed on Exhibit "C" attached hereto and incorporated herein by reference. Upon closing Buyer will accept the Property subject to the underlying obligation and to those easements and restrictions. Seller will, however, so long as Buyer is current on his obligations hereunder, make all payments due on the underlying obligation.

3. Substitution of Security. Should Buyer desire to develop the Property and thus need fee title thereto unencumbered by the underlying obligation prior to the time that the underlying obligation is paid in full by Seller, Seller will, at Buyer's request, exercise its rights to substitute security as provided in the Trust Deed securing the underlying obligation. Buyer shall provide a portion of the substituted security equal to the then unpaid balance hereunder. That security shall be deemed substituted security for the purposes of this agreement also and upon receipt of Buyer's substituted security and a release of the underlying obligation Seller will deed the property to Buyer. Notwithstanding the foregoing, Buyer shall not prepay this agreement, but shall continue to pay according to the terms hereof (which payment shall be secured by the substituted security), unless Seller consents to a prepayment.

Should Seller desire to obtain a release of the Parcel 1 property (even though Buyer might not yet want a release of Parcel 2), Buyer will then be required to put up his share of the substituted security as hereinabove set forth and will at that time receive a deed to the Property free and clear of the underlying encumbrances. Buyer shall, nevertheless, continue to make the payments required hereunder until paid in full according to the terms hereof (which payment shall be secured by the substituted security) unless Seller shall consent to a prepayment.

4. Title. At closing Seller shall provide to Buyer a preliminary title report in the form of Exhibit "D" attached hereto, showing title to be in accordance with this Agreement. Seller agrees that upon recordation of the Warranty Deed delivered pursuant to this Agreement, title will vest in Buyer subject only to those matters and things allowed by this Agreement or approved by Buyer's attorney.

5. Conveyance. The conveyance of the Property to Buyer pursuant to this Agreement shall be by Warranty Deed subject only to the matters and things allowed by this Agreement.

6. Taxes. Real property taxes for the year 1978 shall be prorated at the closing.

7. Possession - Closing Date.

7.1 Buyer shall enter into possession of the Property immediately after the closing. The closing shall be on or before May 16, 1978, and shall be at a mutually convenient location.

7.2 At the closing, Buyer shall deliver to Seller the sum due under subparagraph 1.2 of this Agreement, plus such other sums as may be required to pay any closing charges and prorations, attributable to Buyer.

7.3 As of the close of business on the day prior to closing, the parties shall prorate all taxes and assessments relating to the Property in accordance with the latest tax and assessments bills.

7.4 The closing shall be completed by the parties delivering to each other a statement listing all credits and debits to each party for prorations and closing fees required under this Agreement. This statement shall be conclusively presumed to be correct unless a party protests such statements at the time of the closing. The closing shall be completed by the Buyer delivering to the Seller the sums required by subparagraph 1.2 hereof, plus or minus prorations. Upon the accomplishment of the foregoing, the closing shall be deemed complete and Buyer will be entitled to enter into possession of the

Property.

8. Default. If Buyer fails, neglects, or otherwise refuses to make any of the payments herein agreed to be made when due, a default shall occur, and if Buyer fails to cure said default within ten (10) days after written notice as herein required, Seller shall have the remedies set forth hereafter in this paragraph. If Buyer defaults in any other material term or condition of this Agreement, and such default continues for a period of twenty (20) days, Seller may notify Buyer in writing of such default and of Seller's election to exercise his rights hereunder by notice as herein required. If Buyer has not cured such default within the times above specified, Seller, at his option, and without further notice, shall have the remedies set forth hereinafter in this paragraph.

8.1 Seller shall have the right to be released from all obligations in law and in equity to convey any unconveyed property, and all payments which have been made theretofore by the Buyer shall be forfeited to the Seller as liquidated damages for the non-performance of the Agreement and the Buyer agrees that the Seller may at his option re-enter and take possession of the unconveyed property without legal processes as in its first and former estate, and Buyer becoming at once a tenant at will of the Seller.

8.2 Seller may bring suit on this contract and recover judgment for all unpaid principal and accrued interest, together with costs and attorney's fees. The use of this remedy on one or more occasions shall not prevent the Seller, at his option, from resorting to a different remedy at a later date.

8.3 The Seller shall have the right, at his option, and upon written notice to the Buyer, to declare the entire unpaid balance hereunder to be due and payable, and may elect to treat this contract as a note and mortgage, and pass title to the Buyer subject thereto, and

sold and the proceeds applied to the payment of the balance owing, including costs and attorney's fees, and Seller may have a judgment against Buyer for any deficiency which may remain. In the case of foreclosure, the Seller hereunder, upon the filing of a complaint, shall be immediately entitled to the appointment of a receiver to take possession of the Property and collect the rents, issues and profits therefrom and apply the same to the payment of the obligation hereunder, or hold the same pursuant to order of the court; and the Seller, upon entry of judgment of foreclosure, shall be entitled to the possession of the said premises during the period of redemption.

8.4 After a substitution of security and deed of the Property as provided in paragraph 2 above, Seller's remedies shall be against the substituted security as provided in the letter of credit accepted as substituted security and shall not be against the Property.

9. Brokerage Indemnity. Each party hereto hereby agrees that he will indemnify, defend and hold the other party hereto and his employees harmless from and against and in respect of any claims of brokerage and other commissions relative to this Agreement or the transactions contemplated hereby or any of the documents to be executed pursuant hereto, which claims are based in any way on agreements made by or behalf of the indemnifying party with any other party or parties whatsoever.

10. Binding on Heirs and Assigns. This Agreement is and shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, successors and assigns.

11. Compliance with Applicable Laws. Buyer agrees that, at all times prior to the deed of the Property to Buyer, he will comply with all federal, state and local laws, regulations, rules and orders applicable to the Property or activities or operations thereon or in connection therewith.

12. Title Insurance. At the time the Property is deeded to Buyer pursuant to the terms hereof, Seller shall furnish to Buyer a standard owner's policy of title insurance insuring title to be as set forth in paragraph 4 above.

13. Survey - Acreage. This Agreement is made based upon

sold and purchased contains 6.87 net useable acres, in Sandy City. Should the Property, on survey, contain more or less than 6.87 net useable acres, the purchase price will be adjusted up or down based on a per acre price of \$30,000.

14. Entire Agreement. It is expressly understood by the parties hereto that there are no representations, covenants or agreements between the parties with reference to the Property or the transaction contemplated hereby except as herein specifically set forth or attached hereto.

15. Attorney's Fees. In the event there is a default under this Agreement and it becomes reasonably necessary for either party to employ the services of an attorney, either to enforce or terminate this Agreement, with or without litigation, the losing party to the controversy arising out of the default shall pay to the successful party a reasonable attorney's fee and, in addition, such costs and expenses as are incurred in enforcing or in terminating this Agreement.

16. Notices. Except as otherwise specifically provided, all notices, demands and other communications hereunder shall be in writing and shall be deemed to have been duly given and delivered if mailed by United States certified and registered mail, postage prepaid, to the parties or their assignees at the following addresses or such other addresses as are given in writing from one party to the other:

Buyer: Stanley Wade
2159 Parly's Trace
SLC UTAH 84109

Seller: F. C. Stangl III
c/o Denis R. Morrill, Esq.
455 South Third East
Salt Lake City, Utah 84111

IN WITNESS WHEREOF, the parties have executed this Agreement on the day and year first above written.

SELLER:

F. C. Stangl III


BUYER:

00396

Stanley Wade
Stanley Wade

STATE OF UTAH)
 : ss
COUNTY OF SALT LAKE)

On this 16th day of May, 1978, personally
appeared before me F. C. Stangl III, a signer of the foregoing
instrument, who duly acknowledged to me that he executed the same.



Notary Public
Residing at: Bountiful, Utah

My Commission expires:

16-15-81

STATE OF UTAH)
 : ss
COUNTY OF SALT LAKE)

On this 16th day of May, 1978, personally
appeared before me Stanley Wade, a signer of the foregoing instrument,
who duly acknowledged to me that he executed the same.


Notary Public
Residing at: Bountiful, Utah

My Commission expires:

16-15-81

Exhibit G

Stephen G. Crockett (A0766)
GIAUQUE, CROCKETT & BENDINGER
136 South Main Street, Suite 500
Salt Lake City, UT 84101
Telephone: (801) 533-8383

OCT 3 4 52 PM '91

THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY
BY *Heidi Wilson*

Daniel A. Jensen (A5296)
KIMBALL, PARR, WADDOUPS, BROWN & GEE
185 South State Street, Suite 1300
P.O. Box 11019
Salt Lake City, Utah 84147
Telephone: (801) 532-7840

Attorneys for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY,
STATE OF UTAH

STANLEY L. WADE,)	
	)	STIPULATION
Plaintiff,)	
)	
vs.)	
)	
F. C. STANGL III,)	
)	
Defendant.	)	Civil No. C-87-357
	)	Judge Michael R. Murphy

In connection with the pending trial of the above-referenced matter, plaintiff Stanley Wade ("Wade") and defendant F.C. Stangl III ("Stangl"), by and through their undersigned counsel, hereby stipulate and agree as follows:

1. Pursuant to a written installment land contract dated May 16, 1978, Wade agreed to buy, and Stangl agreed to sell, certain real property for the price of \$206,100. A true and exact copy of said contract is attached hereto as Exhibit A.

of all mathematical calculations in this Stipulation that are based on such acreages.

4. As evidenced by the County Recorder's plat attached as Exhibit E, the Subject Property (i.e., Wade's property) is accessible from 700 East Street by a 50-foot wide non-exclusive right-of-way located along the northern boundary of Stangl's retained property. The parties agree that, if acreage-based apportionment of the taxes is found by the Court to be appropriate, the acreage beneath the right-of-way (amounting to 0.55 acres for a parcel measuring 50 feet by 476.14 feet) should be evenly divided between the two parties.

5. Pursuant to the 1978 installment land contract (Exhibit A), Wade paid Stangl \$50,000 at closing and, eventually, the balance of \$156,100 plus 8½% interest, which balance was payable in 79 equal monthly installments of \$2,586.99.

6. Until the 1991 tax year, the consolidated 9.63-acre tract of land containing the Subject Property has never been separately assessed to establish individual taxes for Wade's 6.87 acres and Stangl's 2.76 acres. Instead, Stangl has been taxed each year for the consolidated property as a single, undivided parcel. Beginning with the 1991 tax year, the two parcels will be separately taxed.

7. Exhibits F through N are true and correct copies of the annual Tax Notices received by Stangl from the Salt Lake County Treasurer for the consolidated property for the tax years 1982 through 1990, respectively.

11. As evidenced by the documents attached as Exhibit O, Stangl has paid the property taxes assessed against the entire consolidated tract each year since 1978 except for the year 1990, which taxes have not yet been paid. Stangl hereby agrees to pay the full amount of said 1990 taxes on the consolidated property in the event that the Court awards Stangl a judgment based on acreage apportionment which includes the 1990 taxes.

12. As evidenced by the documents attached as Exhibit P, Wade reimbursed Stangl for a portion of the property taxes for the years 1978, 1979, 1980 and 1981 as set forth below:

<u>Tax Year</u>	<u>Amount Paid by Wade</u>	<u>Date Paid</u>
1978	\$1,410.34	12/26/78
1979	\$2,381.04	05/13/81
1980	\$2,654.13	01/04/82
1981	\$3,304.73	01/07/82

As also evidenced by the documents attached as Exhibit P, the amounts paid by Wade during the above-listed years were based on the acreage or square footage of the land owned by Wade as compared to the total amount of land within the consolidated tract.

13. Recognizing that the parties disagree as to the appropriateness of apportioning the property taxes based on the percentage of acreage owned by each party, the parties agree that if acreage-based apportionment is found by the Court to be appropriate, Exhibit Q accurately sets forth under the heading of "Tax Assessed" the yearly amounts properly subject to apportionment between the parties, as determined from the county's Tax Notices

for the years 1982 through 1990 (Exhibits F through N) modified as follows:

(a) In 1984, Stangl persuaded Salt Lake County to reduce the property tax assessment on the jointly-owned property by \$538.54 for the 1982 tax year and by \$746.13 for the 1983 tax year. These amounts have been deducted from the amounts appearing on the corresponding annual Tax Notices.

(b) A small portion of the taxes for the years 1982 through 1986 corresponded to a moveable, skid-mounted building that was located on Stangl's portion of the property. The specific amount attributable to this improvement, as specified and set forth by the Salt Lake County Assessor in the Tax Notices for those years (Exhibits F through J), has been deducted from the amounts subject to apportionment for the purposes of calculating Wade's proportionate share of the property taxes. The building was removed from the property in 1987. Exhibits K through N, the county Tax Notices for 1987 through 1990, reflect this absence of any improvements on the property.

(c) In 1988 Stangl conveyed 0.65 acres from his part of the property for use as a public road. Exhibits L, M and N, the county Tax Notices for 1988, 1989 and 1990, reflect this reduction in the total amount of acreage. This conveyance modified, slightly, the ownership percentage of each party.

(d) In August of 1989, Stangl engaged Strategis Asset Valuation and Management Company to appeal the amount of taxes

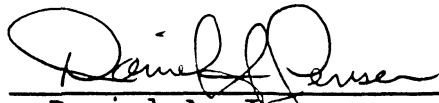
assessed to the jointly-owned property for 1989. Strategis succeeded in lowering the 1989 taxes from \$27,029.80 to \$11,752.02, a savings of \$15,277.78 to both parties. Strategis' fee for such action was 33.3% of the reduction amount of \$15,277.78, or \$5,087.50. ~~This amount should properly be considered a tax-related expense inuring to the benefit of both parties and is therefore added to the tax amount for 1989 to be apportioned between the parties along with the tax for that year.~~ B7D

14. The parties further agree that if acreage-based apportionment is found by the Court to be appropriate, Exhibit Q accurately sets forth the apportioned property taxes for the tax years 1982 through 1990 based on the acreage owned by each party and the equal division of acreage beneath the right-of-way. For the 1991 tax year, the two parcels will for the first time be taxed separately. Therefore, no apportioned amount is included in Exhibit Q for the year 1991.

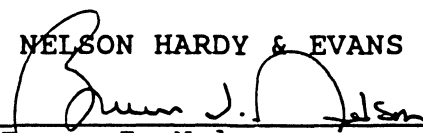
15. The parties further agree that if acreage-based apportionment is found by the Court to be appropriate and if the Court determines that Stangl is entitled to prejudgment interest in accordance with Utah Code Ann. § 15-1-1(2) on Wade's share of the taxes so apportioned, Exhibit Q accurately sets forth the prejudgment interest on Wade's proportionate share and the total amount of taxes and interest owed by Wade to Stangl.

DATED this 3rd day of October, 1991.

KIMBALL, PARR, WADDOUPS, BROWN & GEE

By 
Daniel A. Jensen
Attorneys for Defendant

ALLEN NELSON HARDY & EVANS

By  *
Bruce J. Nelson
Attorneys for Plaintiff

* This stipulation is an attempt to save time for the Court and to reduce the time required to produce evidence to back up the stipulated facts. P+S does not, however, waive any defenses which he may have by executing this document, nor does he believe this Stipulation implies his agreement with Defendant's position in the lawsuit.

Exhibit H

CONSTRUCTION CO.
 4370 SOUTH 500 WEST . SALT LAKE CITY, UTAH 84107 . PHONE (801) 223-2811
 SPECIALISTS IN COMMERCIAL AND INDUSTRIAL PLANNING AND DEVELOPMENT

December 8, 1980

CERTIFIED MAIL R.R.R.
CERTIFICATE NO. 0596800

Mr. Stanley Wade
 2159 Parley's Terrace
 Salt Lake City, Utah 84109

Dear Stan:

Please consider this letter as notification of the following items:

1. A billing for your portion of the 1980 property taxes as per the Purchase Agreement on the land located at 9225 South 7th East in Sandy, Utah.
2. A notice of your default of the aforementioned Purchase Agreement for nonpayment of the 1979 property taxes and interest owed for the period between the closing date and the date of the first payment. (Previous billing enclosed.)

Enclosed is a copy of the tax notice and receipt for payment of the 1980 property taxes on the land covered by your Purchase Agreement. Your portion has been computed as follows:

$\$3,843.80 \div 430,340.81 \text{ sq. ft.} \times 284,573.36 \text{ sq. ft.} = \$2,541.81$
 $\$3,843.80 \div 430,340.81 \text{ sq. ft.} \times 120,617.45 \text{ sq. ft.} = \$1,077.35$
 $\$3,843.80 \div 430,340.81 \text{ sq. ft.} \times 25,150.00 \text{ sq. ft.} = \$ 224.64$

Wade - Basic Area	\$2,541.81
½ Right of Way	112.32
	\$2,654.13

Stangl - Basic Area	\$1,077.35
½ Right of Way	112.32
	\$1,189.67

To date, the following monies are owed:

Interest	\$ 552.85	
1979 Property Taxes	2,381.04	— paid 5/13-81
1980 Property Taxes	2,654.13	
December 1980 Payment	2,586.41	→ pd. 12/15/80
	\$8,174.43		→ 5,588.02

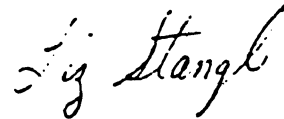
00730

Page Two

May we please have your check for \$8,174.43 made payable to Franz C. Stangl, III at the above letterhead address within twenty (20) days in order to correct your existing default and conclude your 1980 obligation as per the Purchase Agreement.

Sincerely,

F. C. STANGL CONSTRUCTION CO.

A handwritten signature in cursive script, appearing to read "Elizabeth Stangl", written over a horizontal line.

Elizabeth Stangl

EAS:pjw
Enclosures

00731

F. C. STANGL CONSTRUCTION CO
SOUTH 700 EAST • SUITE 300 • SALT LAKE CITY, UTAH 84107 • PHONE (801) 262-0381
SPECIALISTS IN COMMERCIAL AND INDUSTRIAL PLANNING AND DEVELOPMENT

January 4, 1982

EXHIBIT

2

Mr. Stanley Wade
2159 Parley's Terrace
Salt Lake City, Utah 84109

Mr. Stanley Wade
918 Logan Avenue
Salt Lake City, Utah 84105

Dear Stan:

I am writing to acknowledge the receipt of the checks in the following amounts:

- A. F. C. Stangl's check to you for \$2,586.91
- B. Your checks for:
 - (1) \$ 618.52 Interest
 - (2) \$10,347.64 Oct. '81-Jan. '82 payments
 - (3) \$ 2,586.91 Sept. '81 payment
 - (4) \$ 2,654.13 1980 taxes (incorrect \$)

We are depositing the above checks in anticipation of (1) your bringing in the signed documents that I understand you were to bring today, and (2) your payment of 1981 property taxes.

Apparently you did not understand how the 1981 property tax proration was achieved. It was figured exactly the same way as were the previous years taxes as shown on the "corrected billing" (copy enclosed). That is:

Total tax (\$4,335.56) ÷ by total acreage (9.632) x Wade
acreage (6.87) = \$3,092.33.

Thus of the total \$19,511.93 as broken down on the attached "corrected billing" sheet, agreed as owed, and subsequently written into the new documents as owing, \$16,207.20 has been paid and \$3,304.73 is still due.

An additional "corrected billing" sheet has been enclosed showing paid and due dollars in red. If I have made an error in my computations, I will be glad to sit down with you so that it may be corrected.

3304.73 pd. by
Wade on 1/6/82
J. Stangl 1/7/82

00167

However, I expect to either hear from you immediately regarding any billing error or receive both the dollars due and the signed documents by return mail.

Sincerely,

F. C. STANGL CONSTRUCTION COMPANY

Elizabeth Stangl

EAS:pjw
Enclosures

00068

	Due	Due	Total
1978 TAXES - \$3241.38 (Wade parcel for 230 days only)	1456 ⁸²	1784 ⁵⁶	3241 ³⁸
1979 TAXES - \$3448.32	2459 ⁵¹	988 ⁸¹	3448 ³²
1980 TAXES - \$3843.80	2741 ⁵⁸	1102 ²²	3843 ⁸⁰
1981 TAXES - \$4335.56	3092 ³³	1243 ²³	4335 ⁵⁶
Tax Totals	9 0 ²⁴	5118 ⁸²	14869 ⁰⁶
Wade has paid as of 11/30/81	$\left\langle \begin{array}{l} 1410^{34} \\ 2381^{04} \end{array} \right\rangle \rightarrow \text{pd. } 12/26/78$ $\left\langle \begin{array}{l} 1410^{34} \\ 2381^{04} \end{array} \right\rangle \rightarrow \text{pd. } 5/13/81$		
Total Tax Due	5958 ⁸⁶		
Total Stan Wade Payments Due		pd. 1/4/82	Owing
Property Taxes Per Above	5958 ⁸⁶	2654 ¹³	3304 ⁷³
August 1981 Contract Payment	2586 ⁹¹	2586 ⁹¹	—
September " " "	2586 ⁹¹	2586 ⁹¹	—
October " " "	2586 ⁹¹	2586 ⁹¹	—
November " " "	2586 ⁹¹	2586 ⁹¹	—
December " " "	2586 ⁹¹	2586 ⁹¹	—
Interest from 5/16/78 - 6/1/78 on:			
\$156,000.00 (Contract Balance)			
1,000.00 (Earnest Money)			
9,000.00 (Not Pd. in Closing)			
\$166,000.00 @ 8 1/2 % x 16 Days =	618 ⁵²	618 ⁵²	—
			00069
Total Due	19511 ⁹³	16207 ²⁰	3304 ⁷³

Single Parcel - 2.762 ACRES
 1978 Taxes - \$3241.38
 (Wade parcel for 230 days only)

1978 Taxes - \$3241.38
 (Wade parcel for 230 days only)

1979 Taxes - \$3448.32

1980 Taxes - \$3843.80

1981 Taxes - \$4335.56

Tax Totals

Wade has paid as of 11/30/81

Total Tax Due

Total Stan Wade Payments Due

Property Taxes Per Above

August 1981 Contract Payment

September " " "

October " " "

November " " "

December " " "

Interest from 5/16/78 - 6/1/78 on:

\$156,000.00 (Contract Balance)

1,000.00 (Earnest Money)

9,000.00 (Net Pd. in Closing)

\$166,000.00 @ 8 1/2 % x 16 Days =

Total Due

0007

F. C. STANGL CONSTRUCTION CO.

4370 SOUTH 500 WEST

SALT LAKE CITY, UTAH 84109

PHONE (801) 262-0381 / 262-2475
SPECIALISTS IN COMMERCIAL AND INDUSTRIAL PLANNING AND DEVELOPMENT

May 14, 1980

Stanley Wade
2159 Parley's Terrace
Salt Lake City, Utah 84109

Dear Stan:

Please consider this letter as a billing for interest owed and for the 1979 property taxes as per your Purchase Agreement.

The Purchase Agreement between you and Mr. Stangl states that interest from the May 16, 1978 Purchase Agreement closing date through June 1, 1978 - i.e. \$552.85 was to have been paid with the first payment. To date this interest has not been paid. I have enclosed a copy of the pertinent portion of the Purchase Agreement.

Also enclosed is a copy of the tax receipt which includes the land covered by your Purchase Agreement. Your portion is as follows:

Wade	284,573.36	square feet	(parcel 317 X 348.315)
Stangl	120,617.45	square feet	
Right of Way	25,150.00	square feet	
	<u>430,340.81</u>	square feet	

Tax

Wade - Basic Area	2280.28
½ right of way	<u>100.76</u>
	2381.04

Stangl - Basic Area	966.51
½ right of way	<u>100.77</u>
	1067.28
TOTAL	<u>3448.32</u>

00751

Page two
May 14, 1980
Stanley Wade

In summary, the following monies are due:

Interest	\$ 552.85
1979 Property Taxes	<u>2,381.04</u>
Total Due	\$2,933.89

May we please have your check for \$2,933.89 made payable to Franz C. Stangl at the above letterhead address by return mail.

Sincerely,

ELIZABETH STANGL

ES:njf

enc:

00752

F. C. STANGL CONSTRUCTION CO.

4455 SOUTH 700 EAST • SUITE 300 • SALT LAKE CITY, UTAH 84107 • PHONE (801) 262-0381

SPECIALISTS IN COMMERCIAL AND INDUSTRIAL PLANNING AND DEVELOPMENT

November 24, 1986

Mr. Stanley Wade
2159 Parley's Terrace
Salt Lake City, Utah 84109

*Taking
file*

File

Dear Stan:

Enoch Bautista contacted this office on November 19, 1986 regarding your desire to have the 6.87 acres (at 9225 South 700 East you contracted to purchase from me on the 16th day of May, 1978) deeded to you. You are in default now and you have been continuously in default since sometime in 1981. I have sent notices to you many times, and as in the past, you did not respond.

Our most recent letter to you, dated November 3, 1986, written by Liz Stangl, gave you one last chance to clean up the delinquencies without penalties and interest. You chose to ignore it until after the November 13, 1986 deadline set in the letter. On November 20, 1986, someone from your office brought a copy of an A-1 Distributing check #1040, dated November 13, 1986, made out to F.C. Stangl Construction in the amount of \$19,810.74. This delivery was made a week after the offered no-penalty date passed and the day after I told Enoch Bautista that I would no longer accept the amount set forth on the November 3, 1986 letter (\$19,810.74), but that I would calculate the amount of penalty and interest as assessed by the Salt Lake County Treasurer for the years of back taxes and he could pay that amount on your behalf. The following is a list of monies due as quoted to Mr. Bautista:

	Penalty 2%	Interest to 11/28/86	TOTAL
\$2,749.69 1982 Taxes	\$54.83	@ 8% \$868.81	\$3,665.33
\$3,781.05 1983 Taxes	75.62	@ 8% 891.49	4,748.16
\$4,044.79 1984 Taxes	80.90	@ 8% 625.59	4,751.28
\$4,588.71 1985 Taxes	91.77	@13% 548.48	5,228.96
<u>\$4,654.50</u> 1986 Taxes	N/A Now	N/A Now	<u>4,654.50</u>
\$19,810.74		TOTAL DUE ON 11/28/86	\$23,048.23

The person that left the copy of the check also left a handwritten note that says the check will be turned over to Utah Title. It is of no significance to me who it is turned over to. It is made out to the incorrect payee for the incorrect amount and dated a date different than the date it was offered for payment.

00753

Mr. Stanley Wade
November 24, 1986
Page Two

If you will prepare a check for the correct amount, \$23,048.23 (if prior to November 28, 1986) and to the correct payee, namely the seller under the contract, F.C. Stangl III and give it to me, the deed you request can be then prepared and delivered to you. I will clear up the delinquent taxes due to Salt Lake County and deliver you a clear title insurance policy, as called for in the contract.

You really know how to try a person's patience!

Sincerely,

F.C. Stangl III

FCS:cj

00754

Concerning Mr. Wade
this will be turned
over to Utah Title.

LAW OFFICES OF
MAAK & MAAK
A PROFESSIONAL CORPORATION
370 EAST SOUTH TEMPLE
SUITE 300
SALT LAKE CITY, UTAH 84111
TELEPHONE (801) 358-7700

CHARLES L. MAAK
DUCE A. MAAK

November 19, 1981

MAILED BY REGISTERED MAIL
AND CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

Mr. Stanley Wade
2159 Parley's Terrace
Salt Lake City, Utah 84109

Re: Agreement dated May 16, 1978 concern-
ing land located at approximately
9225 South 700 East, Sandy, Utah

Dear Mr. Wade:

As you know, I represent F. C. Stangl III in connection
with the referenced Agreement.

By the terms of the referenced Agreement, you have for
some time been obligated to pay to Mr. Stangl the following
amounts:

Four installments, each in the amount of \$2,586.91, due on the first days of August, September, October, and November, 1981	\$ 10,347.64
Interest accrued between the closing date of the Agree- ment and June 1, 1978	552.85
1980 property taxes	<u>2,654.13</u>
Total	\$ 13,554.62

In addition to the foregoing amounts, Mr. Stangl has
incurred attorney's fees in attempting to enforce this Agreement
by virtue of your default. The amount of such attorney's fees is
not yet precisely ascertainable.

Both the undersigned and personnel at Mr. Stangl's
office have mailed and/or delivered to you a large number of

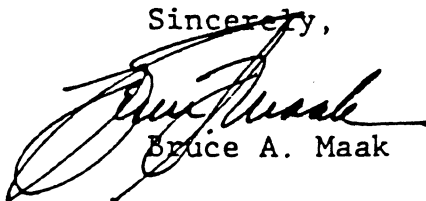
00757

Mr. Stanley Wade
November 19, 1981
Page 2

letters and requests requesting payment of the foregoing sums, all of which you are obligated to pay by the terms of the Agreement.

In the event that you have not paid to Mr. Stangl the foregoing sums within ten (10) days after the giving of this written notice, Mr. Stangl will exercise his rights and remedies under Section 8.3 of the Agreement. My advice by my letter of October 27, 1981 that Mr. Stangl intended to exercise his rights under Section 8.1 of the Agreement was in error, and you should disregard that advice.

Sincerely,



Bruce A. Maak

BAM:rj

cc: Mr. F. C. Stangl III

Certified No. 4586582

00758

January 29, 1982

Mr. Stanley Wade
2159 Parley's Terrace
Salt Lake City, Utah 84109

Mr. Stanley Wade
918 Logan Avenue
Salt Lake City, Utah 84105

*sent in same envelope w.
Shaw's letter of 1/28/82*

Dear Stan:

I apologize for not explaining fully enough how the tax billings were arrived at.

Until 1981, I was going on the assumption that the amount of Total Acreage was the same as that indicated on the site plan here in our office.

So, until 1981, I was using (1) 9.879 acres as the Total Acreage involved and (2) a parcel 817 feet x 348.315 feet indicated on our site plan as yours, plus (3) one half of a parcel 50 feet x 503 feet indicated on our site plan as the right of way in order to come up with your billing.

After having the property surveyed, we found that the Total Acreage was only 9.632 acres and that one half of the right of way is within your 6.87 acres. Consequently, I refigured the taxes based on the true numbers. Since I thought that I had been charging you for your acreage plus part of the right of way, I frankly assumed I had been overcharging you for taxes, but it does not work out that way. The square footage I had been charging you for was actually only 6.82 acres and the Total Acreage was less than I had figured.

Until 1981 you were charged thus:

<u>Total Tax</u>	divided by	<u>Total Sq. Ft.</u>	x	<u>Wade Sq. Ft.</u>	=	Wade \$
<u>Total Tax</u>	divided by	<u>Total Sq. Ft.</u>	x	<u>1/2 Right of Way Sq. Ft.</u>	=	Wade \$
						Total Wade Bill

When tax bills were corrected they were computed thus:

Total Tax divided by Total Acreage x Wade Acreage = Wade Bill

00732

Attached is a schedule comparing the two methods shown above and the results.

I appreciate receiving your check for the balance showing in my letter of January 4th in the amount of \$3,304.73 in anticipation of my sending the scheduled breakdown.

Sincerely,

F. C. STANGL CONSTRUCTION COMPANY

Elizabeth Stangl

EAS:pjw
Enclosures

00733

Consolidated Billing

As Previously Billed

	Total Tax \$	Total Sg. Fk.	Wade Sg. Fk.	1/2 Right of Way Sg. Fk.	Wade Sg. Fk.	Wade Right of Way Sg. Fk.	Wade Bill	Total Tax \$	Total Revenue	Wade Revenue
1978	3,241. ⁰⁰	430,340.81	284,573.34	112,575	(2,443. ⁴⁴)	94. ⁷¹	(2,238. ¹⁵)	3,241. ⁰⁰	9,632	6.87
Parasol bill for 230 Days (5/16/78 - 10/16/78)										
1979	3,448. ³²	430,340.81	284,573.34	112,575	2,240. ²⁵	1,00. ⁷⁵	23,81. ⁰¹	3,448. ³²	9,632	6.87
1980	3,843. ⁰⁰	430,340.81	284,573.34	112,575	2,511. ⁸¹	112. ¹²	24,59. ¹²	3,843. ⁰⁰	9,632	6.87
Sub Total										
							6,443. ⁵¹			
1981								4,335. ²⁵	2,632	6.87
Total										
Paid 12-26-78	Sub									
Paid 5-18-81	"									
Paid 1-4-82	"									
Paid 1-6-82	"									
Paid 1-6-82	"									
Due										

00734

STANLEY WARE CONTRACT

Date	Pay't Amount	Interest	Principal	Balance
5-16-78				
7-1-78	2,586.91	1,105.00		156,000.00
8-18-78	2,586.91	1,094.50	1,481.91	154,518.09
9-18-78	2,586.91	1,083.93	1,492.41	153,025.68
10-23-78	2,586.91	1,073.29	1,502.98	151,532.71
11-14-78	2,586.91	1,062.56	1,513.62	150,009.08
12-26-78	2,586.91	1,051.77	1,524.35	148,484.74
1-15-79	2,586.91	1,040.89	1,535.14	146,949.59
2-12-79	2,586.91	1,029.94	1,546.02	145,403.58
3-16-79	2,586.91	1,018.91	1,556.97	143,846.61
4-18-79	2,586.91	1,007.81	1,568.00	142,278.61
5-17-79	2,586.91	996.62	1,579.10	140,699.51
6-14-79	2,586.91	985.36	1,590.29	139,109.22
7-26-79	2,586.91	974.01	1,601.55	137,507.67
8-24-79	2,586.91	962.59	1,612.90	135,894.77
10-1-79	2,586.91	951.08	1,624.32	134,270.45
10-23-79	2,586.91	939.50	1,635.83	132,634.62
11-25-79	2,586.91	927.23	1,647.41	130,987.20
1-3-80	2,586.91	915.07	1,659.08	129,326.12
2-4-80	2,586.91	904.24	1,670.24	127,657.28
3-7-80	2,586.91	892.32	1,682.67	125,974.61
4-9-80	2,586.91	880.32	1,694.59	124,280.02
5-2-80	2,586.91	868.23	1,706.57	122,573.43
5-12-80	2,586.91	856.05	1,718.68	120,854.75
6-12-80	2,586.91	843.79	1,730.86	119,123.89
7-20-80	2,586.91	831.45	1,743.12	117,380.78
8-18-80	2,586.91	819.01	1,755.46	115,625.31
9-22-80	2,586.91	806.49	1,767.90	113,857.42
10-16-80	2,586.91	793.88	1,780.42	112,077.00
11-13-80	2,586.91	781.12	1,793.03	110,283.97
12-15-80	2,586.91	769.39	1,805.73	108,478.23
1-17-81	2,586.91	757.61	1,818.52	106,659.71
2-16-81	2,586.91	745.53	1,831.40	104,828.31
3-16-81	2,586.91	729.47	1,844.33	102,983.92
4-14-81	2,586.91	716.31	1,857.44	101,126.49
5-12-81	2,586.91	703.06	1,870.60	99,255.89
6-17-81	2,586.91	689.72	1,883.85	97,372.05
7-20-81	2,586.91	676.28	1,897.19	95,474.86
8-18-81	2,586.91	662.75	1,910.63	93,564.23
9-14-81	12,457.55	649.16	1,924.15	91,640.08
1-4-82	412.82	635.58	1,937.77	91,640.08
2-5-82	2,586.91	622.01	1,951.40	91,640.08
	2,586.91	608.31	1,965.10	91,640.08
	2,586.91	594.56	1,978.88	91,640.08
	2,586.91	580.76	1,992.73	91,640.08
	2,586.91	566.91	2,006.64	91,640.08
	2,586.91	553.02	2,020.62	91,640.08
	2,586.91	539.08	2,034.67	91,640.08
	2,586.91	525.09	2,048.79	91,640.08
	2,586.91	511.06	2,062.96	91,640.08
	2,586.91	496.98	2,077.19	91,640.08
	2,586.91	482.86	2,091.47	91,640.08
	2,586.91	468.69	2,105.80	91,640.08
	2,586.91	454.48	2,120.18	91,640.08
	2,586.91	440.23	2,134.61	91,640.08
	2,586.91	425.94	2,149.10	91,640.08
	2,586.91	411.61	2,163.64	91,640.08
	2,586.91	397.24	2,178.24	91,640.08
	2,586.91	382.83	2,192.89	91,640.08
	2,586.91	368.38	2,207.59	91,640.08
	2,586.91	353.89	2,222.34	91,640.08
	2,586.91	339.36	2,237.14	91,640.08
	2,586.91	324.79	2,251.99	91,640.08
	2,586.91	310.18	2,266.89	91,640.08
	2,586.91	295.53	2,281.84	91,640.08
	2,586.91	280.84	2,296.84	91,640.08
	2,586.91	266.11	2,311.89	91,640.08
	2,586.91	251.34	2,326.99	91,640.08
	2,586.91	236.53	2,342.14	91,640.08
	2,586.91	221.68	2,357.34	91,640.08
	2,586.91	206.79	2,372.59	91,640.08
	2,586.91	191.86	2,387.89	91,640.08
	2,586.91	176.89	2,403.24	91,640.08
	2,586.91	161.88	2,418.64	91,640.08
	2,586.91	146.83	2,434.09	91,640.08
	2,586.91	131.74	2,449.59	91,640.08
	2,586.91	116.61	2,465.14	91,640.08
	2,586.91	101.44	2,480.74	91,640.08
	2,586.91	86.23	2,496.39	91,640.08
	2,586.91	70.98	2,512.09	91,640.08
	2,586.91	55.69	2,527.79	91,640.08
	2,586.91	40.36	2,543.54	91,640.08
	2,586.91	24.99	2,559.34	91,640.08
	2,586.91	9.58	2,575.19	91,640.08
	2,586.91		2,591.09	91,640.08

Dec 82	2,586.91	481.63	2,155.28	55,780.18
	2,586.91	416.26	2,171.55	55,609.63
	2,586.91	400.08	2,185.43	54,422.70
	2,586.91	355.50	2,231.41	53,222.31
	2,586.91	369.91	2,217.00	50,005.29
	2,586.91	354.20	2,231.71	47,772.58
	2,586.91	338.25	2,248.52	45,524.06
	2,586.91	322.46	2,264.45	43,259.62
	2,586.91	306.42	2,280.49	40,979.13
	2,586.91	290.27	2,296.64	38,682.49
	2,586.91	274.00	2,312.91	36,369.58
	2,586.91	257.62	2,329.29	34,040.29
DEC 1983	2,586.91	241.12	2,345.79	31,694.49
Jan	2,586.91	224.50	2,362.41	29,332.08
Feb	2,586.91	207.77	2,379.14	26,952.95

1982	9,149.19	9,149.19
1983	2,957.24	3,984.24
To 12/31/83	47,049.07	47,092.62

Property taxes - 1980 paid 1/4/82 2654.13
 " " 1981 paid 1/7/82 3304.73

Property taxes for 1982 — 1982 have not been paid
 yet. We currently have a judgement against Alan Wade
 for these.

00737

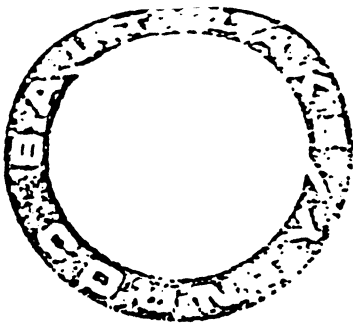
Stan Wade History

Due Date	\$ Chgd.	Description	\$ Paid	Date Paid
Billed 5-10-76 + 12-1-76	2461.00	Practitioner's Office		
Billed 5-10-76	1100.00	Excess Money	1100.00	12-15-76
Billed again 6-22-76	4900.00	Down Payment	4900.00	5-18-78
8 1/2 %	15600.00	Balance of Contract	9000.00	7-15-78
pay today. Seller 2. Billed value of 552.05		Interest from closing to 6/1/78		
July 1, 1978 (Billed closing)	2550.00	1st payment	2550.00	7-15-78
8-1-78				8-1-78
9-1-78				9-1-78
10-1-78				10-1-78
11-1-78				11-1-78
12-1-78				12-1-78
1-1-79				1-1-79
2-1-79				2-1-79
3-1-79				3-1-79
4-1-79				4-1-79
5-1-79				5-1-79
6-1-79				6-1-79
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12-1-79				12-1-79
1-1-80				1-1-80
2-1-80				2-1-80
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9-1-80				9-1-80
10-1-80				10-1-80
11-1-80				11-1-80
12-1-80				12-1-80

FROM THE DESK OF
LIZ STANGL

The \$ shown on the amount
billed, not take as corrected -
with correction they are an
additional \$152.11

00738



SALT LAKE COUNTY ASSESSOR

Room 309 City & County Building
Salt Lake City, Utah 84111

December 18, 1984

R. MILTON YORGASON
COUNTY ASSESSOR

ELEANOR LEE BRENNAN
CHIEF DEPUTY

The Honorable Board of County Commissioners
Room 407, City & County Building
Salt Lake City, Utah 84111

Attention: D.M. Stewart

Re: Parcel No. 38-05-351-006
Serial No. 34A 0175-151
Adjustment of 1981-1983 General
Taxes

Gentlemen:

We kindly request that you adjust the 1981, 1982 and 1983 general taxes on Parcel No. 38-05-351-006 (Serial No. 34A 0175-151) as shown below and abate all balance, penalties and interest if paid within 30 days.

<u>YEAR</u>	<u>ORIGINAL TAXES</u>	<u>CORRECTED TAXES</u>	<u>AMOUNT ADJUSTED</u>
1983	\$6249.90	\$5503.77	\$746.13
1982	4531.84	3993.30	538.54
1981	4335.56	3820.35	515.21
		<u>\$13317.42</u>	<u>Total due 1,799.88</u>

A carwash on this property was double assessed with Parcel No. 28-05-351-001.

If you agree with our recommendation, please advise the County Treasurer accordingly

TO: ARTHUR L. MONSON COUNTY TREASURER
THE BOARD OF COUNTY COMMISSIONERS
APPROVED () DENIED ()
THIS LETTER AT ITS MEETING HELD ON:

12/26/84
H. DRON HINDLEY, COUNTY CLERK

By Eleanor Lee Brennan-Fessler
Commissioner, Clerk

Very truly yours,

R. MILTON YORGASON, County Assessor

By Eleanor Lee Brennan-Fessler
Chief Deputy

RLY:tk

cc: F. C. Stangl, III
6270 S. Van Cott Rd.
SLC, Utah 84121

Re: 1-24-85
SK
paid.

00760

F. C. STANGL CONSTRUCTION
433 SOUTH 700 EAST • SUITE 300 • SALT LAKE CITY, UTAH 84107 • PHONE (801) 262-0381
SPECIALISTS IN COMMERCIAL AND INDUSTRIAL PLANNING AND DEVELOPMENT

November 3, 1986

EXHIBIT

3

Mr. Stanley Wade
2159 Parley's Terrace
Salt Lake City, UT 84109

Dear Stan:

Enclosed are copies of the 1985 and 1986 tax notices on the property located at 9225 South 700 East in Sandy, Utah.

Following is a breakdown showing your pro rata share of the aforementioned taxes.

1985

\$6,433.55	-- 9.632 Total acres X 6.87 acres =	\$4,588.71	- Wade
\$6,433.55	-- 9.632 Total acres X 2.762 acres =	<u>\$1,844.84</u>	- Stangl
		\$6,433.55	

1986

\$6,525.78	-- 9.632 Total acres X 6.87 acres =	\$4,654.50	- Wade
\$6,525.78	-- 9.632 Total acres X 2.762 acres =	<u>\$1,871.28</u>	- Stangl
		\$6,525.78	

The property taxes billed to you on 9/21/82 and 1/30/85 for 1982, 1983 and 1984 are still outstanding.

Thus, the following monies are due:

\$2,741.69	1982 taxes
3,781.05	1983 taxes
4,044.79	1984 taxes
4,588.71	1985 taxes
4,654.50	1986 taxes
<u>\$19,810.74</u>	TOTAL DUE

We need to receive a check for \$19,810.74 sent to the above letterhead address by return mail in order to clear this up. If we receive a check for the total due within ten (10) days of the above dated letter, we will waive the tax penalties and accruing interest. If not received by 11/13/86, all penalties and interest as assessed by the Salt Lake Treasurer will be applied.

Sincerely,

Elizabeth Ann Stangl
Property Management

00071

EAS:sde

Exhibit I

Aug 16 4 30 PM '96

Alvin Wong

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY,
STATE OF UTAH

Civil No. C-87-357
Judge Michael R. Murphy

DISPUTATION OF WADE'S "RELEVANT" FACTS

With regard to Wade's relevant fact No. 1, Stangl denies and disputes that "[t]he Salt Lake County assessor assessed the

frontage acreage at a higher rate than the rear acreage." In reality, both parcels have been taxed as one parcel ever since the property was sold to Wade. Wade admits as much in his fact No. 2 when he states that "the parcels have not been segregated for tax purposes," that they cannot be so segregated until a deed is recorded, and that the two parcels have been taxed as one parcel.

Wade's only support for his assertion that the two parcels were assessed at different rates is paragraphs 5 and 6 of the Affidavit of A. Paul Schwenke. The opinions recited in those paragraphs of the Schwenke affidavit are hearsay and are inadmissible. Utah Rule of Civil Procedure 56(e); Western States Thrift & Loan Co. v. Bloomquist, 504 P.2d 1019 (Utah 1972). Paragraphs 5 and 6 of the Schwenke affidavit also constitute conclusory and unsubstantiated opinions and are inadmissible for those additional reasons. Treloggan v. Treloggan, 699 P.2d 747 (Utah 1985); Norton v. Blackham, 669 P.2d 857 (Utah 1983). Stangl, therefore, objects to the Affidavit of A. Paul Schwenke and Wade's attempted use of it.

Stangl also disputes Wade's characterization of the two parcels as "front" and "rear." Although Wade's parcel is located behind Stangl's with respect to 700 East Street, Wade's parcel includes a 50-foot wide right-of-way to 700 East Street so that access to both parcels is the same.

With regard to Wade's relevant fact No. 2, Stangl agrees that the parcels have not been segregated for tax purposes, but denies and disputes that the "larger parcel is taxed as one unit." It is the entire parcel (made up of Wade's larger parcel and Stangl's smaller parcel) that is taxed as one unit.

With regard to Wade's relevant fact No. 3, Stangl agrees (except for the same inaccurate reference to the "larger" parcel as discussed above) that Wade was charged his share of the taxes based on the area owned by each party (although it was based on acreage rather than square footage). Stangl has no knowledge as to why Wade decided to stop paying on this basis (or any basis) after approximately three years.

With regard to Wade's relevant fact No. 4, Stangl agrees that Wade refused to pay any taxes (after 1981), but denies and disputes that Wade's refusal was conditioned on a determination of "the taxes attributable to his portion of the land." The record reflects that Wade never offered any excuse for his cessation of tax payments. In fact, until recently Wade denied that he owed any taxes whatsoever for the years 1978 through 1985 (the term of the installment land contract). See Plaintiff's Answers to Defendant's First Request for Admissions and First Set of Interrogatories, Response to Interrogatory No. 2.

With regard to Wade's relevant fact No. 5, Stangl agrees that Wade eventually completed making the required payments in 1985, but

denies and disputes that this "completed" Wade's performance under the contract. Wade's performance has never been completed because of his refusal to pay the tax debt attributable to his property. Under the terms of the contract (Wade's Exhibit A) in paragraph 8, Stangl is not obligated to convey a deed to the property so long as Wade is in default, and Stangl alleges that Wade's failure to pay his tax debt is a default under the contract.

Finally, with regard to Wade's relevant fact No. 6, Stangl agrees with the facts set forth therein, but notes that the action was filed on January 13, 1987, rather than January 20, 1987.

As a final, but important, matter with regard to factual disputes, Stangl points out to the Court that six months ago Wade argued to the Utah Supreme Court that there are factual disputes at issue in this matter precluding summary judgment. The Utah Supreme Court agreed, and vacated this Court's order of summary judgment. The facts of this dispute today are identical to the facts that existed previously when Wade argued, successfully, against summary judgment. Wade has not offered any explanation for the sudden disappearance of the previously existing factual disputes. The unexplained abandonment of Wade's prior argument that summary judgment is inappropriate is compelling evidence of the amount of credence that should be given to his present argument.

DISPUTATION OF WADE'S LEGAL ANALYSIS

The crux of Wade's legal argument is that the Utah Supreme Court "held as a matter of law that the real estate contract in question does not provide for on going obligation [sic] for real estate taxes," and that Wade is therefore only liable for the taxes attributable to his land under the doctrine of equitable conversion. Wade's supporting memorandum at 2-3. Wade then argues that the amount attributable should be based on the assessed value of the property. Thus, Wade does not dispute his liability for the taxes, but only the amount attributable to his land.

The Supreme Court's only "holding" was that "material facts are in dispute" and that summary judgment was therefore not appropriate. The court's brief explanatory comments concerning contractual obligations do not amount to findings of fact or conclusions of law and do not resolve the existing factual and legal disputes. Indeed, the case was remanded to this Court for the taking of evidence and for further proceedings as appropriate in light of that evidence. The Supreme Court's order vacating summary judgment does not resolve the issue of Wade's contractual liability or the manner in which Wades's liability for back taxes should be determined.

Wade then attempts to explain why the amount of taxes attributable to his land should be based on the assessed values of each parcel. It is difficult, if not impossible, to determine the

"assessed value" of the two parcels for each year since 1978. As Wade acknowledges in his fact No. 2, the parcels have never been segregated for tax purposes, cannot be so segregated without the recording of a deed, and have been taxed since 1978 as one parcel. Wade's counsel has attempted to overcome this problem by providing calculations according to his belief as to the values of the land based on hearsay evidence obtained through conversations with someone at the county assessor's office. Notwithstanding a sincere attempt, these calculations are nonunderstandable.

Moreover, the entire basis of Wade's calculations is erroneous. Paragraph 5 of the Affidavit of A. Paul Schwenke states, pursuant to a hearsay conversation, that "the land bought by the Plaintiff had a gross market value of \$20,000.00 per acre." Yet paragraph 13 of the 1978 sales contract (Wade's Exhibit A) provides that if after a survey of Wade's property there is more or less than the contemplated 6.87 acres, "the purchase price will be adjusted up or down based on a per acre price of \$30,000." This clearly indicates that the parties considered the value of the property to be \$30,000 per acre rather than \$20,000 as used in Wade's calculations.

In any event, Stangl denies and disputes that Wade's approach to calculating the parties' respective tax liabilities is proper in fact or in law. Wade has cited no legal authority to show that the "assessed value" (which is likely impossible to determine in

any event) is the only or proper method for calculating the taxes attributable to his land.

Stangl asserts that the proper method, in law and in fact, for calculating the parties' respective tax liabilities is to apportion the taxes based on the amount of acreage owned by each party. Wade's purchase was in the form of a seven-year installment land contract by which Wade bought 71% of a parcel of land owned by Stangl. Stangl retained an adjacent 29% of his property. The contract imposed on Wade an obligation to pay a proportionate share of property taxes and assessments for the year of the closing (1978) (see Wade's Exhibit A, ¶¶ 6, 7.3), but the contract did not state how the real property taxes were to be divided during the remainder of the seven-year executory period.

Wade paid for his proportionate share of the property taxes for the years 1978 through 1981 based on the proportionate amount of acreage owned by each party. However, since 1982 Wade has refused to contribute his proportionate share, or any share, of the real property taxes assessed to the property. Stangl has been forced to pay the entire amount himself each year since 1981. Thus, for each year in which Wade paid any taxes toward the subject property the parties used the acreage apportionment method to divide liability for the real property taxes, with Wade paying 71.34% of the taxes (based on ownership of 6.87 acres of the 9.63-

acre tract) and Stangl paying 28.66% (based on ownership of 2.76 acres of the 9.63-acre tract).

While the parties' installment land contract (Wade's Exhibit A) does not expressly specify how the property tax liability is to be allocated during the seven-year executory period following the year of the closing, it does state that taxes for the year 1978 are to be "prorated at the closing" and that "the parties shall prorate all taxes and assessments relating to the Property in accordance with the latest tax and assessment bills." See Wade's Exhibit A, ¶¶ 6, 7.3. It is undisputed that the parties continued to prorate the taxes according to the acreage owned by each party for the years 1979, 1980 and 1981. See Wade's relevant fact No. 3. The parties have never used any other method of allocating the property taxes. Wade argues, however, that because the installment land contract does not expressly state how the real property taxes are to be divided during the balance of the executory period, the parties' respective tax liabilities should be based on the separate "assessed values" of the two parcels rather than the acreage owned by each party as was done in the past.

Wade's after-the-fact legal argument is without basis. As this Court recognized earlier in the dispute, the well-established doctrine of practical construction resolves any dispute as to the appropriateness of the acreage apportionment method of allocating the property tax liability. Under the doctrine of practical

construction, Wade is obligated to continue to pay his share of the taxes based on his proportionate share of the acreage.

"This rule of practical construction is predicated on the common sense concept that 'actions speak louder than words.'" Bullough v. Sims, 400 P.2d 20, 23 (Utah 1965). The decision in Bullough clearly shows why Wade's prior actions obligate him to continue to abide by an acreage apportionment method for dividing the taxes. In Bullough, the losing party argued that the terms of a written contract were unambiguous and that extrinsic evidence could not therefore be used to alter or change the contract. Id. at 22. The court responded: "This is generally true, but there are exceptions; one of which is that when the parties place their own construction on it and so perform, the court may consider this as persuasive evidence of what their true intention was." Id. The Bullough court then went on to thoroughly explain the doctrine of practical construction, which applies directly to the present dispute:

This rule of practical construction is predicated on the common sense concept that "actions speak louder than words." Words are frequently but an imperfect medium to convey thought and intention. When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts should enforce their interest.

Appellants correctly claim that this doctrine of practical construction can only be applied when the contract is ambiguous, and cannot be used when the contract is

unambiguous. That is undoubtedly a correct general statement of the law. [Citations omitted.] But the question involved in such cases is ambiguous to whom? Words frequently mean different things to different people. Here the contracting parties demonstrated by their actions that they knew what the words meant and were intended to mean. Thus, even if it be assumed that the words standing alone might mean one thing to the members of this court, where the parties have demonstrated by their actions and performance that to them the contract meant something quite different, the meaning and intent of the parties should be enforced. In such a situation the parties by their actions have created the "ambiguity" required to bring the rule into operation. If this were not the rule the courts would be enforcing one contract when both parties have demonstrated that they meant and intended the contract to be quite different.

Id. at 23 (quoting Crestview Cemetery Ass'n v. Dieden, 356 P.2d 171 (Cal. 1960)) (emphasis added); accord Bullfrog Marina, Inc. v. Lentz, 501 P.2d 266, 271 (Utah 1972).

As in Bullough, Wade's prior actions speak louder than his present words. The first four years of Wade's undisputed conduct demonstrate that he understood the taxes were to be allocated on an acreage apportionment basis. Even if there is no express requirement or "ambiguity" in the written terms of the installment land contract with respect to ongoing tax liability, the parties have created the ambiguity required to bring the rule into operation. For this Court to adopt an assessed value apportionment scheme would be the equivalent of enforcing one contract when both

parties have demonstrated that they meant and intended the contract to be quite different.¹

Wade further argues that he is not responsible for any taxes on his land after 1984 (the termination of the contractual executory period) because of Stangl's alleged default in not conveying the property to Wade. Stangl has alleged in his Counterclaim (and alleges here) that Wade beached the contract four years prior to the termination of the contractual executory period when he ceased to pay, despite written demands, any amounts toward the taxes attributable to his property. Under paragraphs 8 and 8.1 of the contract, Stangl was excused from conveying a deed to Wade's property because of Wade's default four years prior to the default attributed to Stangl in 1985. Stangl therefore denies and disputes Wade's assertion that no taxes are owned after 1984.

¹In addition to Bullough, other Utah cases have similarly and consistently applied the doctrine of practical construction. See Eie v. St. Benedict's Hospital, 638 P.2d 1190, 1195 (Utah 1981) ("Though arguably clear on its face, where the parties demonstrate by their actions that to them the contract meant something quite different, the intent of the parties will be enforced."); Zeese v. Estate of Siegel, 534 P.2d 85, 90 (Utah 1975) ("Under the doctrine of practical construction, when a contract is ambiguous and the parties place their own construction on their agreement and so perform, the court may consider this as persuasive evidence of what their true intention was. The parties, by their action and performance, have demonstrated what was their meaning and intent; the contract should be so enforced by the courts.").

For the foregoing reasons, Stangl disputes Wade's analysis of the relevant legal issues, and denies and disputes that Wade is entitled to summary judgment as a matter of law.

DISPUTATIONS AS TO ATTORNEY'S FEES AND COSTS

Stangl also denies and disputes that Wade is entitled to attorney's fees. Wade's default from failure to pay any taxes occurred four years prior to Stangl's alleged failure to convey. Stangl was therefore released from all obligations in law or equity to convey a deed to Wade's property. Wade's Exhibit A, ¶ 8.1. Because Wade was the first and only defaulting party, it is Stangl, not Wade, who is entitled to attorney's fees pursuant to paragraph 15 of the sales contract (Wade's Exhibit A).

Furthermore, Stangl disputes and hereby objects to certain legal charges claimed in paragraphs 8 and 9 of the Affidavit of A. Paul Schwenke. Mr. Schwenke affirms that he rendered the following services and incurred the following costs:

06/25/89	Telephone Conf. Dan Jensen	.30	90.00	27.00
06/25/89	Prep. Appl. for Stay Order etc.	6.00	90.00	540.00
06/25/89	Court appearance Supersedeas	1.00	90.00	90.00
06/26/89	Court appear. Judge Rigtrup	1.00	90.00	90.00
06/27/89	Telephone conf. Deana AIRD INS.	1.00	90.00	90.00

* * *

Supreme Court filing fees	125.00
Appeal fees, district court	35.00
Photo copies:	

* * *

06/25/89	9.20
06/27/89	17.00

* * *

Lost interest from ceased funds	\$5,750.00
---------------------------------	------------

This Court, in an Order dated November 21, 1989 and attached hereto as Exhibit A, expressly and categorically denied Wade's request for costs on appeal, for costs associated with the garnishment of his certificate of deposit, and for lost interest on the certificate of deposit. In an attempt to get in through the back door what he could not through the front, the services and costs quoted above (amounting to \$6,773.20) are included in the Schwenke affidavit in an apparent hope that no one would notice them.

The improper charges for services are for Wade's unsuccessful attempt to obtain a bond in lieu of garnishment, which bond could have and should have been obtained before the garnishment ever took place. The improper charges for costs include appeal fees to the District and Supreme Courts, copy fees during the garnishment time period, and the same \$5,750.00 in lost interest from the certificate of deposit to which this Court has expressly ruled that Wade has no entitlement.


Stangl objects to the express misrepresentations to the Court set forth in paragraphs 8 and 9 of the Affidavit of A. Paul Schwenke. As the first and only defaulting party, Wade is not entitled to any attorney's fees, and even if he were he would not be entitled to those fees and costs quoted, discussed and objected to above.

CONCLUSION

The material facts of this lawsuit are not undisputed and Wade is not entitled to summary judgment as a matter of law. Stangl therefore requests that the Court deny Wade's Motion for Summary Judgment.

RESPECTFULLY SUBMITTED this 16 day of April, 1990.

KIMBALL, PARR, CROCKETT & WADDOUPS

By 
Stephen G. Crockett
Daniel A. Jensen
Attorneys for Defendant

CERTIFICATE OF SERVICE

This is to certify that on this 16th day of April, 1990, a true and correct copy of the foregoing MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT was hand-delivered to:

A. Paul Schwenke, Esq.
165 South West Temple, #300
Salt Lake City, UT 84101

Myoma Christensen

Exhibit J

COPY

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

STANLEY L. WADE,
Plaintiff,

VS .

F. C. STANGL III,
Defendant.

CASE NO. C87-357

REPORTER'S TRANSCRIPT

October 4, 1991

BEFORE THE HONORABLE MICHAEL R. MURPHY
District Court Judge

A P P E A R A N C E S:

For the Plaintiff:

Bruce J. Nelson
Attorney at Law
215 South State Street
Salt Lake City, Utah 84101

For the Defendant: Stephen G. Crockett
Giauque, Crockett & Bendinger
136 South Main Street, #500
Salt Lake City, Utah

1

GAYLE B. CAMPBELL
CERTIFIED SHORTHAND REPORTER
SALT LAKE CITY, UTAH

1 Salt Lake City, Utah

October 4, 1991

2 P R O C E E D I N G S

3 THE COURT: This is Wade v. Stangl,
4 C87-347. Mr. Bruce Nelson here on behalf of the
5 plaintiff, and Mr. Crockett here on behalf of the
6 defendant. And is the plaintiff present with you?

7 MR. NELSON: Yes, he is, Your Honor.

8 THE COURT: All right.

9 MR. CROCKETT: Mr. Stangl is present.
10 Mr. Dan Jensen is also present on behalf of Mr. Stangl.

11 THE COURT: All right. One thing that I
12 don't think the record may be entirely clear about at
13 this time, and that is, that I recused myself on a
14 specific issue in this case, and not in the case in its
15 entirety.

16 The specific issue being whether or not there
17 should be relief from judgment under Rule 60(b). The
18 reason why I recused myself was that the issues on that
19 motion, I felt, might appear to be or could in fact be
20 intrinsically intertwined with prior counsel for the
21 plaintiff, and I had referred to the Utah State Bar
22 some difficulties that I had with prior counsel for the
23 plaintiff. And successor counsel -- and I don't mean
24 Mr. Nelson, but some other successor counsel before Mr.
25 Nelson came along, had some difficulties also. And I

1 A If the property closed mid-year, half of
2 the taxes for the year would be owed by the seller, and
3 the other half would be owed by the buyer. Just to
4 demonstrate. And if the property was a ten acre
5 parcel, and the buyer bought six acres of it, and the
6 seller sold four acres of it, the seller would be
7 charged with 40% of the tax amount. And the buyer
8 would be charged with 60% of the tax amount based upon
9 the entire assessment for the entire property. That
10 is, the values or the cost of the taxes would be
11 apportioned that way.

12 Q You have reviewed the record, and that
13 was in fact what occurred in 1978; is that correct?

14 A Yes.

15 Q All right. After 1978, what was the
16 original anticipation that would happen with regard to
17 payment of taxes for the parcels?

18 A We thought that the taxing authorities
19 would bill each of us for our respective taxes, and we
20 would each pay our respective taxes for our parcel.

21 Q Did that in fact happen?

22 A It did not.

23 Q What happened instead?

24 A The taxing authority, Salt Lake County,
25 issued one tax assessment for the entire property,

1 agreement they are going to dispute was correct, and in
2 fact that did happen.

3 THE COURT: Anything else?

4 MR. NELSON: No.

5 THE COURT: The objection is overruled.
6 I do think it goes to the weight.

7 Q (By Mr. Crockett) Maybe we can do this
8 by stipulation, rather than Mr. Stangl trying to
9 interpret the tax notices. We have looked at those,
10 and let me proffer that in 19 -- where we have it
11 written down in 1991, the parcel sold to Mr. Wade went
12 from \$8,640 in 1990 to \$13,812 in 1991. The
13 differential -- would you stipulate that's what the
14 records would show if we put them in?

15 MR. NELSON: I'm afraid you are
16 comparing apples and oranges. The properties weren't
17 separated until 1991. You are comparing the large
18 parcel assessment in 1990 to just Mr. Wade's portion in
19 '91.

20 MR. CROCKETT: No, we are comparing the
21 apportionment in 1990 to what Mr. Wade's parcel was
22 obligated in terms of taxes versus what was actually
23 assessed in 1991 after the breakout.

24 THE COURT: It assumes the apportionment
25 theory.

1 MR. NELSON: Based on that assumption,
2 and if you stick to that, yes, I --

3 THE COURT: I understand you don't agree
4 with apportionment.

5 MR. NELSON: Thank you.

6 MR. CROCKETT: Okay.

7 Q (By Mr. Crockett) Mr. Stangl, I cut you
8 off there. What was said in that conversation, if
9 anything, that you had with Mr. Wade at that point in
10 time?

11 A We felt with the location of the right
12 of way, where it would be against the north side of the
13 property, or through the center of my property in the
14 front, and with the improvements to be added to that
15 right of way in the future.

16 THE COURT: All right. Did you conclude
17 your discussions with an amendment to the contract that
18 you had in 1978 with Mr. Wade?

19 A Yes, sir.

20 Q Did you ever, to your knowledge, make
21 that position known to Mr. Wade, that you viewed that
22 as amending the contract.

23 A I think through letters from my office
24 to him, yes.

25 MR. CROCKETT: Okay. Your Honor, we

1 would call your attention to Exhibit "P", and the court
2 will note that there are several letters included in
3 Exhibit "P". It is a packet of letters that went from
4 -- or that was put in the mail to go from Mr. Stangl to
5 Mr. Wade.

6 There is no stipulation he actually received
7 it, but the stipulation -- if called to testify, the
8 testimony would be that these letters were placed in
9 the mail and sent to Mr. Wade in the ordinary course of
10 Mr. Stangl's business; is that correct?

11 MR. NELSON: That's correct.

12 MR. CROCKETT: All right.

13 MR. NELSON: For purposes of the record,
14 may I just indicate that there may be a statute of
15 frauds or statute of limitations issue here. I don't
16 mean to waive that by not objecting to all the
17 questions. I would like to reserve that until we see
18 where this line of questioning goes, if I may.

19 THE COURT: Well, wait a minute. Let's
20 get to the statute of frauds issues right away. Are
21 you saying that the written agreement is clear and
22 unequivocal as to taxes?

23 MR. NELSON: The agreement certainly
24 doesn't say anything about taxes, other than the 1978
25 taxes would be prorated. Mr. Stangl just indicated he

1 believed that they amended the contract. It's my
2 position that any amendment to the contract would have
3 to be in writing.

4 MR. CROCKETT: The contract doesn't
5 provide that, number one. And I don't believe we have
6 a statute of frauds problem. There's never been one
7 pled in this case. I think that is going to who owes
8 what obligations on taxes, and does not go to
9 transferability of property, which would require a
10 statute of fraud. I think that's possibly why it
11 hasn't been asserted.

12 MR. NELSON: I'm not sure there has been
13 a reply to the counterclaim in the file. As I was
14 reviewing the file last night, I noticed there are some
15 allegations in one of the pleadings, maybe a court
16 order based upon the fact there is no reply to the
17 counterclaim which has been filed. So I don't know
18 whether it was raised, or not. I would like it raised
19 now, if it hasn't been raised before. I don't believe
20 you can amend the contract without writing.

21 THE COURT: Let me ask this: Assuming
22 you are correct, how then does one go about resolving
23 the primary issue in this case, and that is, the
24 allocation of taxes?

25 MR. NELSON: The contract.

1 THE COURT: The contract doesn't say
2 anything.

3 MR. NELSON: Then I guess you go by what
4 the standard is in the industry, in the valley. And
5 you go by statute, Your Honor, which requires property
6 taxes to be based upon its fair market value. When you
7 apply that statute to this contract, I think it's clear
8 how you do it.

9 MR. CROCKETT: You are going to hear
10 some evidence on that.

11 THE COURT: Doesn't the statute of fraud
12 void or make voidable a contract if it is subject to
13 the statute of frauds, and the statute of frauds is not
14 adhered to? Isn't that the relief under the statute of
15 frauds problem?

16 MR. CROCKETT: Void or voidable if it's
17 subject to the statute?

18 THE COURT: Right.

19 MR. CROCKETT: I agree.

20 THE COURT: Well, I'm going to take Mr.
21 Crockett's representation at face value, unless you can
22 point out to me something different. And that is, that
23 the statute of frauds has not been pleaded and there is
24 an affirmative obligation to plead that. And
25 therefore, it would be inapplicable as being waived.

Q Can you tell me then why the first year when he sent you a request based upon a square footage tax you paid it to him?

A The reason I paid the taxes at that time is to eliminate the hassles. Because we were talking about developing the ground. And at that time I figured that it wouldn't be -- you know, that something would happen in the next year, whatever, and I didn't want to argue with him anymore.

Q Did you also believe that the property the next year could be split off into two separate taxing parcels?

A Yes, I did.

Q So then are you telling me that the reason you paid the amount he asked was just to avoid the hassle for that one year?

A Yes.

Q And then you said it was paid the same way for the next two years. Why did you do that?

A Same reasons.

Q Did you ask him to separate it into two parcels?

A Yes.

Q Tell me when you asked him to do that.

A I asked him the second time I talked to

wishes, and instead of coming forward and meeting his responsibilities, such as to provide the court and provide counsel all documents which relate in any way to this.

There is nothing before me to create a belief by me that there are documents that somehow object to the allocation of the taxes. I'm assuming that Mr. Wade's testimony is that there are perhaps some response to those letters, Exhibit "P". I can hardly credit any of those when I don't have those in front of me. This failure to be involved in the appropriate manner and by the appropriate evidence in this case continued even after all the payments were made under the contract in question.

I believe that was completed some time in 1982. And so that the cutoff on this allocation should not be at that date, but instead should be at the later date, and that is the date when they were severed for tax purposes.

One thing that I was affected by in choosing to credit the testimony of Mr. Stangl and discredit the testimony of Mr. Wade is the interplay of two items: Number one, it is very clear that Mr. Wade has gone through a proceeding involving fraud. Mr. Wade also testified that he did everything in strict accordance

Exhibit K

A. Paul Schwenke #3951
Attorney for Plaintiff
175 South West Temple #300
Salt Lake City, Utah 84101
Telephone: (801) 531-1029

IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY,
STATE OF UTAH.

STANLEY L. WADE,)	
	)	AFFIDAVIT OF A. PAUL
Plaintiff,	)	SCHWENKE IN SUPPORT OF
vs.	)	PLAINTIFF'S MOTION
	)	FOR SUMMARY JUDGMENT.
)	
F.C. STANGL III	)	Case No. <u>C87-357</u>
)	
Defendant.	)	Honorable Michael Murphy

I, A. Paul Schwenke, after being first duly sworn, deposed and says:

1. I am the attorney of record for the Plaintiff, Stanley L. Wade, and in said capacity I have acquired personal knowledge of the facts stated herein except where specifically stated the statement is of the best knowledge or belief.

2. I have good faith belief that the Defendant sold a larger portion of one large parcel of commercial property to the Plaintiff. The Defendant retained a smaller frontage portion of the land with a building on it. The Plaintiff took the larger rear acreage.

3. The parcels have not been segregated for tax purposes, so the larger parcel is taxed as one unit. The parcels cannot be segregated until a warranty deed is recorded showing the partial conveyance.

specific performance, requiring the Defendant to deliver a warranty deed pursuant to the real estate contract.

5. Based on information I obtained from the Salt Lake County Assessor's Office, I have discovered that the portion of the land bought by the Plaintiff had a gross market value of \$20,000.00 per acre. I also discovered that the portion of the land retained by the Defendant had a gross market valuation of \$20,000 per acre for commercial acre, \$2.00 per square foot for commercial square footage, and a gross market value for improvements.

6. That I consulted with the Salt Lake County Assessor's office and the Salt Lake County Treasurer's office, and based on the information provided by each office, I was able to construct or determine the amount of property taxes actually accrued to the Plaintiff's portion of the land. The said computation is included in the memorandum in support of Plaintiff's motion for summary judgment.

7. That the real estate contract between the parties award attorney fees, costs and expenses to the non-defaulting party.

8. That I have charged \$10,042.00 in attorney fees to date in connection with this case, itemized as follows:

<u>Date</u>	<u>Service performed</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
12/18/86	Interview client about case	.50	80.00	40.00
01/ /87	Conference with Stangl	2.00	80.00	160.00
01/19/87	Prep. Summons & Complaint	2.00	80.00	160.00
02/24/87	Telephone Conf. with Crocket	.25	80.00	20.00
10/13/87	Review file	.20	80.00	16.00
10/14/87	Telephone conf. with Crocket	.20	80.00	16.00
03/20/88	Answer interrog. Admissions	2.00	80.00	160.00

11/20/88	Review file & motion to amend	2.00	80.00	160.00
12/05/88	Telephone conf. counsel	.50	90.00	45.00
12/22/88	Review mot. Sum. Jud & ans/co	1.50	90.00	135.00
01/19/89	Prepare statement in Opposition	1.00	90.00	90.00
02/11/89	Prep. & file 59(e) motion			
02/12/89	" "			
02/19/89	" "	11.00	90.00	990.00
02/17/89	Prepare & file Req. for hearing	.50	90.00	45.00
03/21/89	Prepare & serve Notice	.50	90.00	45.00
03/27/89	Prep. Wade aff. & meet to sign	2.00	90.00	180.00
04/03/89	Hearing	2.00	90.00	180.00
04/11/89	Prep 2nd 59(e) motion, aff etc.			
04/12/89	" "			
04/13/89	" "	13.00	90.00	1,170.00
04/25/89	Prepare Notice to Submit	.20	90.00	18.00
06/20/89	Prepare & file Notice of Appeal	.50	90.00	45.00
06/25/89	Telephone Conf. Dan Jensen	.30	90.00	27.00
06/25/89	Prep. Appl. for Stay Order etc.	6.00	90.00	540.00
06/25/89	Court appearance Supersedeas	1.00	90.00	90.00
06/26/89	Court appear. Judge Rigtrup	1.00	90.00	90.00
06/27/89	Telephone conf. Deana AIRD INS.	1.00	90.00	90.00
06/08/89	Prepare Docketing Statement,			
06/09/89	motion for summary disposition,			
06/09/89	memorandum and affidavits	20.00	90.00	1,800.00
10/24/89	Prepare & file motion & Order			
	to show cause	2.00	90.00	180.00
11/13/89	Prepare & file memorandum and			
	motion for sanctions	4.00	90.00	360.00
02/23/90	Meet with Blake Jessop, SLC			
	county assessor's office	3.00	90.00	270.00
03/09/90	Obtain tax ledger from			
	Treasurer's office and met			
	with Tax Assessor	3.00	90.00	270.00
03/15/90	Prepare and file motion for			
03/16/90	summary judgment, memorandum,			
03/20/90	affidavits. Meet with Stan			
03/21/90	Wade.			
03/22/90	" "	24.00	90.00	2,160.00
	TOTAL.....			\$ 10,042.00

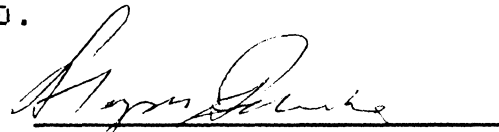
9. That the Plaintiff has incurred the following costs in connection with the prosecution of this case.

Filing fees	75.00
Service fees	22.00
Supreme Court filing fees	125.00
Appeal fees, district court	35.00
Photo copies:	
01/19/87	2.60
03/20/88	2.00
01/19/89	.40

02/21/89	16.00
03/17/89	.40
03/21/89	.40
03/27/89	2.40
04/13/89	11.00
04/25/89	.40
06/20/89	.40
06/25/89	9.20
06/27/89	17.00
07/10/89	95.00
10/24/89	1.40
11/13/89	8.40
03/22/90	11.00
Lost interest from ceased funds	<u>\$5,750.00</u>
TOTAL.....	\$6,185.00

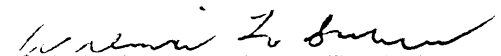
10. That the total cost to Plaintiff, to date, as a direct result of this law suit to enforce his contractual rights \$16,227.00.

Dated this 22nd day of March, 1990.


A. Paul Schwenke

A. Paul Schwenke, appeared personally before me and stated to me under oath that he knows of the above facts to be true except the facts he stated to be his belief.

Subscribed and sworn to before me this 26th day of March, 1990.


NOTARY PUBLIC, residing
in Salt Lake County.

My Commission expires:

Aug 7, 1992

The subject property was taxed during the relevant time based on three separate valuation units; to wit: (1) Commercial square footage; (2) Commercial acreage and (3) Improvements. Beginning with the tax year 1978, each of the units had gross market valuation (GMV) as follows:

1. \$2.00 per square foot of frontage.
2. \$20,000 per commercial acreage.
3. \$6,225.00 for improvements.

Please see Exhibit C.

It is undisputed that the Plaintiff bought 6.87 acres of rear property assessed only as commercial acreage. Agreement, para. 13. It is further not disputed that the only improvement was located on the portion of the property retained by the Defendant. Wade affidavit, para. _____. The GMV as per each valuation unit in 1978, by each party is as follows:

GMV: (Data from tax ledger for tax years 1978, 1979 and 1980, a true and exact copy is attached hereto as Exhibit G.)

<u>Valuation Unit</u>	<u>Wade</u>	<u>Stanql</u>	<u>Total</u>
1. Commercial Sq. Ft.	-0-	\$ 30,000.00	\$ 30,000.00
2. Commercial Acreage	\$137,400.00	\$ 75,100.00	\$212,500.00
3. Improvements	-0-	\$ 6,225.00	\$ 6,225.00
Grand Totals	\$137,400.00	\$111,325.00	\$248,725.00

PERCENTAGE OF LAND GMV:

The percentage of the total land valuation attributable to each of the parties are computed as follows:

	<u>(a)Wade</u>	<u>(b)Stanql</u>	<u>(c)Total</u>
Total land assessment	\$137,400.00	105,100.00	\$242,500.00
Percentage of total	(a)/(c) =56.66%	(b)/(c) =43.34%	

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095 0360 1270 R C-2 05/06/67
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REC M D 07 ° F 1034.02 FT E S 89 12-10 E
53 FT FR 5A COR OF SEC 5. T 35. R 1E. S
L M E 150 FT S 145 FT E 1117 FT M
348.315 FT M 1267 FT S 203.58 FT M DR
T TO REC. 9.63 AC M CR L.

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